IN THE

Supreme Court of the United States

October Term, 1978

No. 78-

UNITED STATES GYPSUM COMPANY,
NATIONAL GYPSUM COMPANY,
GEORGIA-PACIFIC CORPORATION,
THE CELOTEX CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioners, United States Gypsum Company ("USG"), National Gypsum Company ("National"), Georgia-Pacific Corporation ("G-P") and The Celotex Corporation ("Celotex"), jointly pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in these proceedings on May 29, 1979.

OPINIONS BELOW.

The opinion of the Court of Appeals, not yet reported, is set forth in Appendix A to this Petition.

The unreported opinion of the United States District Court for the Western District of Pennsylvania is set forth in Appendix C to this Petition. This Court's opinion on prior review of this case is reported at 438 U. S. 422 (1978), and is set forth in Appendix D to this Petition. The opinion of the Court of Appeals in the prior appeal of this case is reported at 550 F. 2d 115 (3d Cir. 1977) and is set forth in Appendix E.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on May 29, 1979. This Petition is filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. Whether, in a prosecution for violation of § 1 of the Sherman Act, the government can meet its burden to prove criminal intent without proof of either anticompetitive effects or purpose within the statute of limitations period.

2. Whether, after a criminal defendant has introduced substantial, unrebutted evidence of withdrawal from a conspiracy prior to the statute of limitations period, his Fifth Amendment right to due process of law is violated by requiring him to carry the burden of persuasion on the withdrawal issue.

3. Whether a criminal defendant's constitutional protection against double jeopardy would be violated by a retrial after the prosecution has failed to prove (a) one or more of the distinct objectives of the conspiracy charged in the indictment, or (b) a conspiracy substantially in conformity with that charged in the indictment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fifth Amendment of the United States Constitution provides in relevant part:

> "[No person shall] be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty or property, without due process of law. . . ."

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ."

STATEMENT OF THE CASE.

This case is before this Court for the second time. Petitioners were indicted on December 27, 1973 for allegedly participating in a conspiracy to violate Section 1 of the Sherman Act. The indictment contained only one count, which charged the defendants with engaging, from 1960 to 1973, in a single nationwide anticompetitive agreement having three distinct objectives—to fix the prices of gypsum board, to fix the terms and conditions of its sale, and to adopt uniform methods of packaging and handling.

The expansive nature of the charge brought about the wholesale admission of evidence at a lengthy trial, but produced no direct proof of any agreement among the defendants, either on prices, terms or conditions of sale, or methods of packaging and handling, or otherwise. The prosecution's case was entirely circumstantial and fragmented, consisting, as Judge Hunter stated in the court of appeals, of "masses of evidence concerning a multitude of seemingly unrelated events," most of which "dealt with actions prior to the start of the applicable limitations period." (A99, 550 F. 2d at 127)

Although the jury found petitioners guilty, the court of appeals reversed their convictions. This Court affirmed that reversal, holding, in a majority opinion by the Chief Justice, that the trial judge had erred in instructing the jury on the issues of criminal intent and withdrawal from a conspiracy and also by having a private meeting with the jury foreman in which he imparted additional instructions on the deadlocked jury's duty to reach a verdict. *United States v. United States Gypsum Co.*, 438 U. S. 422 (1978) (App. D., pp. A19 *et seq.*) ("*Gypsum*"). This Court ordered the proper instructions must be given "*[i]f* a new trial takes place." (A62, 438 U. S. at 465, emphasis added)

On remand, petitioners moved for judgments of acquittal on the grounds that the prosecution had failed to prove the elements of a § 1 Sherman Act criminal violation under the standards announced by this Court in its opinion in this case. Petitioners pointed out that a second trial for the same offense which the government had once failed to prove would violate their protection against double jeopardy under *Burks v. United States*, 437 U. S. 1 (1978).[1] The district court denied the motion, and the court of appeals affirmed.

In finding the evidence sufficient to warrant a retrial, the court of appeals disclaimed any reliance on the standard of criminal intent discussed at length in this Court's earlier decision. That standard allowed a finding of criminal intent to be based upon proof that the defendants' conduct produced anticompetitive effects and that it was undertaken with knowledge that such effects would probably occur (A39, 438 U. S. at 444). The court below noted that the prosecution "presented no expert testimony at trial to establish anticompetitive effects." (A10, fn. 4). This fact, coupled no doubt with the "substantial" record evidence of vigorous price competition during the relevant time period (A25, 438 U.S. at 430-31), led the court of appeals to conclude that "the Government appears virtually to have abandoned any contention of [having proven] anticompetitive effects. . . ." (A10, fn. 4).

Having found inapplicable for lack of evidence the principal criminal intent standard discussed in this Court's prior opinion, the court of appeals purported to apply a footnote in the Chief Justice's opinion suggesting a second,

1. Although petitioners had argued that the trial evidence was insufficient, neither the court of appeals nor this Court addressed that issue on the first appeal. Decision of this issue did not appear to be required, however, prior to this Court's decision in *Burks*, which was handed down just two weeks before its decision in *Gypsum*.

stricter standard requiring proof of "conduct undertaken with the purpose of producing anticompetitive effects. . . ." (A40, 438 U. S. at 444-45 n. 21) Although the court of appeals found sufficient evidence of criminal intent based on this stricter standard, it ignored the fact that there was no evidence of the existence of such intent during the statute of limitations period. The court relegated to a simplistic footnote the issue of criminal intent. That footnote did not refer to any proof of anticompetitive purpose in the statutory period.

The apparent rationale of the Third Circuit's opinion was that any proof of price verification after December 27, 1968, the beginning of the statutory period, was sufficient to prove the existence at that time of the charged conspiracy to fix prices, even though the small number of verification contacts in that period had no stabilizing effect on prices. (A7) But uncontradicted evidence showed that in the statutory period a severe price war was being waged and verification had dwindled to a few incidents, none among the three largest producers. The court made no effort to analyze those verification contacts in the light of these uncontradicted facts. Moreover, the court of appeals disregarded the evidence of lawful intent in the form of direct testimony on that issue.

REASONS FOR GRANTING THE WRIT.

In its prior review of this case, this Court sought to correct a long-standing judicial failure to apply well-recognized criminal law standards to Sherman Act prosecutions. (A33-34, 422 U. S. at 438-39) It required that the prosecution prove criminal intent as a necessary element in Sherman Act prosecutions, thus aligning the legal elements of antitrust offenses with those of other criminal offenses. But, as demonstrated by the decision below, this Court's clarification of the elements of the offense will have little practical effect unless the Court also directs its attention to the standards of proof used in criminal antitrust cases.

In *Gypsum*, this Court expressed concern about the danger of overdeterrence in the antitrust context in those factual settings where "the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged." (A36-38, 438 U. S. at 441-43 & fns. 16-17) But overdeterrence is at least as much a function of applied standards of proof as it is of declared elements of the crime. A person attempting to comply with the antitrust laws must be as concerned about whether evidence of his conduct raises a jury issue as he is about how that jury will be instructed. This Court's earlier determination that intent is an essential element of a Sherman Act crime will become a dead letter if the court of appeals' failure to apply that element properly is allowed to stand.

It has been almost forty years since this Court last considered standards of proof in a criminal price-fixing case. *See United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940). Since that time the penalties have increased dramatically from a misdemeanor to a felony, from a maximum fine of $5,000 to $1,000,000, and from a maximum jail sentence of one year to a term of three

years. Thus, the penalty for unjustified convictions is now far more severe, and, as this Court observed, the danger of overdeterrence is far greater. (A38, 438 U. S. at 442 fn. 18) Equally important is the fact that, as a result of this Court's recent decision in *Burks v. United States*, 437 U. S. 1 (1978), a criminal defendant's constitutional protection against double jeopardy now depends on application of the proper standards of proof. The importance of this protection is particularly acute in an antitrust case like this one, where the initial trial lasted almost five months at great expense and burden to the parties and to the court system.[2]

For these reasons, this petition presents questions at least as important as those which led the Court to grant the earlier writ of certiorari in this case.

I. By Not Requiring Proof of Anticompetitive Effect or Purpose in the Statute of Limitations Period, the Court of Appeals Emasculated This Court's Decision on Prior Review of This Case.

The court of appeals held that the prosecution had failed to satisfy its burden of proving the "less elevated" standard of criminal intent set out in this Court's earlier opinion in this case. The present appeal thus puts before this Court the shadowy dimensions of the "elevated standard" of criminal intent which were suggested, but not discussed, in the Court's previous opinion. The latter standard required the prosecution to prove a distinct purpose to produce anticompetitive effects. (A40, 438 U. S.

2. In a related case, Judge Parker held that a second trial of the charges in this case would involve such length, complexity, expense and voluminous evidence as to violate due process of law. He therefore dismissed, on that ground and double jeopardy grounds, a criminal contempt petition filed by the government which sought such a second trial on the heels of the Pittsburgh trial. *United States v. United States Gypsum Co.*, 404 F. Supp. 619, 624 & fn. 15 (D. D. C. 1975).

at 444-45 fn. 21) In finding sufficient evidence of this "elevated standard," the court below gave no consideration to the necessity for proof of criminal intent existing in the statute of limitations period. In fact, there was no evidence of any such criminal intent on the part of any defendant within that period. To prevent emasculation of its earlier decision in this case, this Court should grant certiorari to consider the standard of proof of criminal intent which must be met in this and other Sherman Act cases.

The Court of Appeals treated the statute of limitations as irrelevant to the intent issue. (A10, fn. 4) It relied on testimony of a former employee of petitioner USG who had left the company's employ many years before the commencement of the statute of limitations period, upon the testimony of employees of petitioners who did not engage in the challenged conduct during the period of the statute of limitations,[3] and upon the testimony of an employee of another petitioner who stated, as did the others, that his purpose was to comply with the Robinson-Patman Act.

While relying on this non-probative evidence, the court at the same time ignored the relevant evidence applicable to defendants' conduct within the period of the statute of limitations, which evidence overwhelmingly demonstrated the absence of criminal intent. Petitioner USG ceased verifying with its gypsum competitors prior

3. Since a corporation may not be guilty of criminal intent except through the actual intent of one of its high corporate officials, ALI, *Model Penal Code*, § 2.07(1) (Prop. Off. Draft 1962); *Perkins on Criminal Law*, 639-43 (2d ed. 1969), it necessarily follows that the mental state of corporate agents at an earlier point in time cannot be imputed to the corporate petitioners where those agents are no longer engaged in the activity in question.

to the commencement of the statutory period.[4] National Gypsum directed its employees to cease such verification upon the announcement of this Court's decision in *United States v. Container Corp.*, 393 U. S. 333 (1969). The evidence shows that, with minor unauthorized excep-

4. The court referred to the prosecution's contention that certain testimony by Rhine Simpson of Republic Gypsum "indicates" verification by USG in the statutory period. (A7, fn. 3) The testimony, viewed in context, does not support that interpretation:

> "Q. Now, when you were in session at a Gypsum Association meeting with the secretary present and the lawyer present, was there ever an open discussion of an exchange of prices?
>
> . . . .
>
> "A. OK. The only thing I remember is the Association counsel talking about some court cases on exchange of price information and his report to the membership.
>
> "Q. Was this at or about the time that Mr. Watt said he wasn't going to exchange with you any more?
>
> "A. It was in the latter time that I was in the Association. I got out in the fall of '70. It would have been in the '69-'70 period." (Tr. 2464-65).

The reference to the "'69 to '70 period" clearly referred to the date of the Association meeting, not the date when Watt advised Simpson that he had ceased verification. Even if Simpson's answer is tortuously interpreted to refer to a date when Watt advised him that he had ceased verification, any statement that USG was no longer verifying does not establish when the practice stopped. It could as easily have been several years earlier. Moreover, this testimony is not inconsistent with Simpson's earlier express testimony that USG, including Watt, stopped verification before Simpson's subordinate, Montgomery, began verifying for Republic in 1967. (Tr. 2423, 1966, 2416) Montgomery, also a prosecution witness, supported Simpson's recollection by stating that although he took over verifying "possibly as early as '67" (Tr. 6288-90), he *never* verified with anyone from USG. (Tr. 6314) Furthermore, a wealth of other uncontradicted, unimpeached testimony shows that USG stopped all verification on gypsum products in the late spring of 1968, months before the commencement of the statutory period. (Tr. 8170-71; 8162-63; 8479-80; 12,686-88) The only possible basis for the court of appeals' conclusion is that the jury could have ignored all evidence favorable to USG and that USG had the burden of proving its innocence.

tions,[5] these directions were adhered to by the companies' employees. Such conduct is vital evidence of the *absence* of wrongful intent.

Celotex, based upon the considered professional advice of its lawyer as to the scope of the *Container* decision and the requirements of the Robinson-Patman Act, continued to verify, on a limited and infrequent basis, in the statute of limitations period. The Celotex witnesses who did so uniformly testified that their purpose was to avoid the discrimination forbidden by the Robinson-Patman Act. (Tr. 7473, 7486, 11,528-42, 11,703-13) Similarly, in the statutory period the limited verification[6] in which Georgia-Pacific participated was carefully designed, with the assistance of legal counsel, to comply with both the Sherman and Robinson-Patman Acts. (Tr. 5258, 5273) Thus, the evidence explaining the actions of these two defendents likewise shows a law-abiding purpose rather than anticompetitive motive.

In this Court's prior review of this case, it observed that petitioners' acts of price verification were "difficult to

5. The evidence shows that Webster, a National employee, made only "four, five or six" (Tr. 6394) unauthorized verification contacts with Flintkote in late 1969. Webster testified that he made these contacts on his own after having been instructed not to verify and that he ceased upon being told "verbally and in writing" to stop as soon as his superior found out about it. The court erroneously asserted that Atwell of National also verified in the statutory period. The evidence shows only that Atwell stopped verifying no later than this Court's decision, 18 days after the opening of the statutory period, in *United States v. Container Corp.*, 393 U. S. 333 (Jan. 14, 1969), and there was no evidence that Atwell verified during that 18-day interval. A single document from Celotex' files arguably suggests one unauthorized response by an unidentified USG credit employee to an inquiry on the creditworthiness and existence of special terms to a single account.

6. GP's Burch testified to "10, maybe, or 12" verification contacts over a 32-month period, none of which were with USG or National, the two largest competitors in the industry, and in very few of which Burch provided any information (Tr. 5336, 6320).

distinguish from the gray zone of socially acceptable and economically justifiable business conduct," the legality of which can only be determined by considering the surrounding circumstances. (A36, 438 U. S. at 441 & fn. 16) Had the court of appeals followed this direction, it could only have concluded that the evidence of verification in the statutory period would not support any finding of anti-competitive purpose.

The unrebutted evidence with respect to the statutory period showed vigorous price competition, coupled with the shrinkage of price verification activity to a few insignificant contacts proving, if anything, the complete absence of the requisite criminal intent throughout that period. With respect to the insignificance of verification in the statutory period, the record which the court of appeals ignored showed unequivocally:

(1) entirely disparate conduct among each of the four defendants with regard to verification;

(2) no verification at all by USG, the largest producer;

(3) virtually non-existent and completely unauthorized verification by National, the second largest producer;

(4) extremely rare verification attempts involving one G-P employee acting on advice of counsel;

(5) no verification contacts among USG, National and G-P, the three largest producers; and

(6) infrequent verification by Celotex with certain producers based on the advice of its counsel as to the scope of *Container* and the requirements of the Robinson-Patman Act.

By the commencement of the statutory period an intervening price war had completely changed the market context of these sporadic contacts. As noted by this Court,

petitioners introduced "substantial evidence" of "vigorous price competition" beginning prior to and continuing throughout the entire statute of limitations period. (A25, 438 U. S. at 430-31) This evidence consisted of contemporaneous marketing reports describing increased competitive discounting and declining prices beginning in 1967, continuing into 1968, the year prior to the beginning of the statutory period, and intensifying to "chaotic" proportions throughout the entire statutory period. The contemporaneous evidence was reinforced by detailed economic studies showing, through the entire statutory period, extreme disparity among defendants in actual prices and discounts, constant changes in market share, frequent moves by customers to change suppliers, frequent changes in published list prices and widely varying marketing and distribution techniques among the defendants. Based upon a review of this economic evidence, a distinguished economic expert called by the petitioners concluded that the gypsum board market was, during the relevant period, characterized by "rampant price competition" completely inconsistent with any criminal conspiracy.

This intervening price war severed any factual or presumptive connection between pre-statutory events and those in the statutory period, and it particularly precluded any inference of a criminal intent in the statutory period. If the purpose of verification within the statutory period had been to fix prices, verification would have intensified after 1968 when prices declined and unstable pricing prevailed. But the reverse happened. Where, as here, verification dwindles to a few insignificant contacts during a price war and the few witnesses who have any verification contacts during the limitations period testify that their conduct was guided by the advice of counsel and their purpose was to comply with the Robinson-Patman Act, the factual circumstances, even when viewed most favorably

to the prosecution, simply do not permit the conclusion of an anticompetitive purpose underlying the verification activity. The court of appeals' decision in this case thus violated the mandate of this Court's prior opinion in *Gypsum* and the Court's general admonition to "scrutinize the record for evidence of . . . intent with special care in a conspiracy case" to avoid " 'piling inference upon inference. . . .' " *Anderson v. United States*, 417 U. S. 211, 224 (1974).

The government has repeatedly indicated its belief that this Court's prior decision in this case will have no practical effect.[7] The court of appeals' failure properly to apply that decision to the facts in this case unfortunately bears out that prediction. This Court should act promptly, by granting certiorari in this case, to instruct the lower courts that it meant what it said in *Gypsum*.

II. By Shifting to Petitioners the Burden of Persuasion on Their Withdrawal From the Conspiracy Charged, the Court of Appeals Violated Petitioners' Right to Due Process of Law.

Due process requires the prosecution in a criminal case to prove beyond a reasonable doubt every fact necessary to constitute the crime with which the accused is charged. *In re Winship*, 397 U. S. 358, 364 (1970). This means, as explained in *Mullaney v. Wilbur*, 421 U. S. 684, 701-702 (1975) and reiterated just this term in *Sandstrom v. Montana*, Dkt. No. 78-5384, — U. S. —, 47 U. S. L. W. 4719, 4723 (U. S. June 18, 1979), that the prosecution bears the burden of persuasion beyond a reasonable doubt on every critical element of the offense, even where the matter relates to an "affirmative" defense as to which the defendant may bear an initial burden to

7. See, *e.g.*, 894 BNA Antitrust & Trade Reg. Rep. at p. A-5 (12/21/78); 883 BNA Antitrust & Trade Reg. Rep. at p. A-17 (10/5/78).

produce some evidence. The teaching of these cases was ignored by the court of appeals in this case. In so doing, the court further undercut the holding in *Gypsum* that the prosecution has the burden to prove criminal intent in a case such as this.

The court below paid lip service to the principle that the prosecution has the initial burden to prove the continuation of the charged conspiracy into the statute of limitations period. But the court of appeals failed to recognize that, because of defendants' "substantial" evidence of "vigorous price competition" prior to and throughout the statutory period (A25, 438 U. S. at 430), the government became obligated to prove, beyond a reasonable doubt, that petitioners had not withdrawn from the charged conspiracy prior to the beginning of that period.

In its discussion of withdrawal the court below placed the burden squarely on the defendants to prove that they abandoned any anticompetitive conspiracy prior to the statute of limitations period. (A8) Shifting the burden of persuasion in this fashion enabled the court to overlook the prosecution's failure to introduce any evidence negating withdrawal and to allow the government to rely solely on purported "short-comings" in this evidence which might have permitted the jury to reject it.[8] Obviously, neither the attempt to discredit petitioners' evidence nor a "contention" unsupported by evidence suffices to meet

8. The court of appeals also shrugged off defendants' evidence of withdrawal by citing *United States v. Container Corp.*, 393 U. S. 333 (1969) for the irrelevant proposition that "[t]he continuation of some price competition is not fatal to the Government's case." (A8) But *Container* was a *civil* case as to which a different standard of proof applies. See *United States v. United States Gypsum Co., supra*, 438 U. S. at 446-47 fn. 22. (A42-43 fn. 22) And petitioners do not urge that they proved abandonment "as a matter of law," but rather that the prosecution had the burden of proof on that issue once the petitioners' substantial evidence relating to the point had been introduced.

an affirmative burden of proof. Cf. *Nishikawa v. Dulles*, 356 U. S. 129, 136-38 (1958).

The court of appeals' error had enormous practical consequences, as exemplified by its treatment of petitioner USG, the largest competitor in the industry. Finding no evidence of any conduct in furtherance of the alleged criminal conspiracy by USG in the statute of limitations period,[9] it nevertheless ordered a retrial of USG on the basis that the jury was entitled to disbelieve the testimony of USG witnesses that they had ceased verifying prior to the start of the statutory period. (A7, fn. 3) This erroneous shifting of the burden of persuasion had a serious impact on all defendants, in light of the government's own concession in this Court that "the success of any price-fixing venture depended on the participation of all respondents; if any major producer had withdrawn, price maintenance would have been impossible." Brief for the United States, Docket No. 76-1560, p. 99. In other words, no USG, no conspiracy.

All defendants introduced overwhelming and uncontroverted evidence negating their participation in any criminal conspiracy in the statutory period, in the form of substantial evidence of intense price competition and proof that the purpose of any interseller price verification was to comply with, not to violate, the law. This evidence should be viewed in the context of the virtual disappearance of such verification among defendants—the very practice which the government relied upon to prove the existence of a criminal conspiracy in the pre-statutory period.

In this factual setting, maintenance of the integrity of this Court's decisions in *Gypsum, Mullaney* and *Sandstrom* requires certiorari review. Moreover, the question

9. The Court's plain misreading of Simpson's testimony regarding USG's cessation of verification is discussed at p. 10, above.

of which party bears the burden of persuasion on the issue of withdrawal from a criminal conspiracy raises a fundamental and persistent constitutional issue. This Court should therefore review and redress the court of appeals' violation of petitioners' due process rights in imposing that burden on the defendants.

III. The Court of Appeals' Decision in This Case Violates the Due Process and Double Jeopardy Protection Afforded by This Court's Decision in *Burks v. United States*.

The indictment returned by the grand jury in this case charged the defendants with engaging in a single, unitary, nationwide conspiracy, beginning in approximately 1960 and continuing until 1973, with three specifically designated objectives—to:

> "(a) raise, fix, maintain and stabilize the prices of gypsum board; (b) fix, maintain and stabilize the terms and conditions of sale thereof; and (c) adopt and maintain uniform methods of packaging and handling such gypsum board." (Indictment, ¶ 11, A138).

The indictment further listed 13 specific types of activity allegedly used by the defendants to further the conspiracy, and four effects allegedly ensuing from it.

Notwithstanding its decision adverse to petitioners, the court of appeals was obviously troubled about whether the prosecution's trial evidence was insufficient and about the consequence of a prosecutorial failure to show the existence of the broad conspiracy charged.[10] Yet the court

10. At oral argument, the court submitted a written question asking counsel for both sides about the legal consequences of the prosecution's failure to prove the entirety of the conspiracy charged in the indictment. (A13) Specifically, the question suggested the

of appeals failed to address the fundamental constitutional question: how does *Burks* affect the disposition of conspiracy cases where the proofs adduced at trial fall substantially short of the offense charged in the indictment?

A. The Failure of Proof of Each of the Specified Objectives in the Conspiracy Indictment.

The court of appeals apparently recognized the fact that the prosecution failed to prove two of the three distinct objectives of the conspiracy charged in the indictment.[11] However, the court circumvented the duty imposed upon it by *Burks* to ascertain the sufficiency of the evidence to prove the crime charged by simply rewriting the indictment. In a retrospective effort to conform the indictment to what the court described as "the government's theory" of the case, the court arbitrarily determined "that the second and third objectives—to fix, maintain and stabilize the terms and conditions of sale and to adopt and maintain uniform methods of packaging and handling of gypsum products—are integral parts of the first." (A9)[12]

10. (Cont'd.)
court's concern with the possibilities (1) that the evidence had failed to show a conspiracy for all purposes charged in the indictment and (2) that the evidence did not demonstrate "a conspiracy of the full magnitude and scope charged in the indictment."

11. (A8-9). The only evidence discussed in the court of appeals' opinion relates to the first objective (price fixing), and even that evidence relates only to the verification and stabilization aspects of that charge.

12. By "the government's theory" of the indictment, the court of appeals presumably meant the government's most recent assertions of what this case was about, as found in its statements at oral argument and in its brief in the court below. It might be noted, however, that "the government's theory" of this case has changed repeatedly.

At trial the prosecution argued that this was a straight price fixing case (Tr. 8027-29) and that "[t]here are no charges in the indictment that defendant corporations . . . agreed upon market

This expedient is supported by neither logic nor legal authority, and is tantamount to a court's amendment of an indictment, which this Court has condemned in similar circumstances. *Ex parte Bain*, 121 U. S. 1 (1887).[13]

Here the three distinct objectives are the essence of the conspiracy as alleged in the indictment. Without them the conspiracy is totally undefined. The independent nature of these objectives is attested to by the fact that the indictment specifically designated them as separate objectives. It is not proper, given this distinct enumeration of the conspiracy's objectives, for a court to "make a subsequent guess as to what was in the minds of the grand jury at the time that they returned the indictment." *Russell v. United States*, 369 U. S. 749, 770 (1962).[14]

12. (Cont'd.)
shares". (Tr. 12,125) In the court of appeals the prosecution argued, in contradiction to its position at trial, that petitioners conspired "so that each manufacturer could retain his own percentage of the market". (Arg. Tr. 1114-15) In this Court, the prosecution argued that there was a single verification conspiracy with numerous subconspiracies (Brief for the United States, Dkt. no. 76-1560, pp. 10-35). The prosecution abandoned that position on remand and now argues that this was solely a price fixing case with no independent objectives of fixing credit terms or packaging and handling methods. (A9) But in any event, it is an astonishing legal proposition that a defendant may be tried (or convicted) based on "the government's theory" of the charges rather than on the stated terms of an indictment or information.

13. *See also, Heisler v. United States*, 394 F. 2d 692, 695 (9th Cir.), *cert. denied*, 393 U. S. 986 (1968):

> "Ever since the decision [of this Court] in *ex parte Bain*, 1887, 121 U. S. 1 . . . , it has been the rule that any substantial amendment to the body of an indictment renders the conviction void. The reason is that the defendant is not tried on the indictment of the grand jury, as is his constitutional right under the Fifth Amendment, but on a different charge, and there is no way of knowing whether the grand jury would have returned the amended indictment if given the opportunity. Therefore an indictment cannot be amended in any substantial way, even with the defendant's consent."

14. *Cf.* this Court's decision in *Sanabria v. United States*, 437 U. S. 54, 65-66 (1978):

B. The Failure of Proof of a Conspiracy Substantially as Charged in the Indictment.

The substantial difference between the prosecution's proof and the broad conspiracy charged in the indictment is clear from the court of appeals' own recitation of the evidence. Although the government charged a nationwide, 14-year conspiracy to accomplish three distinct anticompetitive objectives, the opinion below rests solely on evidence of insignificant episodes of price verification within the statute of limitations period.

This Court has long recognized that where a criminal defendant is charged with participation in a broad conspiracy, he can only be convicted if the proof shows his participation in a conspiracy of the scope charged, rather than his participation in one or more smaller sub-conspiracies. *Kotteakos v. United States,* 328 U. S. 750 (1946). In the past, when confronted with broad conspiracy indictments and evidence showing only narrower conspiratorial involvement, courts have remanded such cases for trial on the smaller subconspiracies. But that procedure is no longer appropriate in light of this Court's decision in *Burks.*

In *Burks,* this Court held that where the evidence at a defendant's earlier trial was insufficient to sustain the verdict, retrial is prohibited notwithstanding the fact that

14. (Cont'd.)
"In the Government's view, the numbers theory was 'dismissed' from the case as effectively as if the Government had actually charged the crime in two counts and the District Court had dismissed the numbers count. The first difficulty this argument encounters is that the Government did not in fact charge this offense in two counts. Legal consequences ordinarily flow from what has actually happened, not from what a party might have done from the vantage of hindsight. . . . [citation omitted]. The precise manner in which an indictment is drawn cannot be ignored . . . .'"

a defendant may also have sought a new trial on the basis of other errors. The rule is absolute. "The Double Jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." 437 U. S. at 11. Applied to the *Kotteakos* situation of a conspiracy indictment substantially broader than the evidence actually proves, this prohibition on its face bars a retrial. See *United States v. Bowline,* 593 F. 2d 944, 950-951 (10th Cir. 1979) (Holloway, J., dissenting).

Substantial policy considerations also support such a rule. The prosecution has enormous freedom in drafting indictments. The court of appeals' holding encourages prosecutors to abuse this freedom by presenting indictments far broader than any set of facts which they can prove,[15] and to rely on their opportunity for repeated retrials if their evidence cannot sustain such broad charges.

Significant tactical advantages flow to the prosecution in obtaining extremely broad single-count indictments. Such indictments virtually preclude the defendants from excluding evidence on the basis that it is irrelevant to the charges brought. Should a defendant be convicted, the government then has the right to seek sentencing on the basis of the broad conspiracy to which the jury's verdict of guilty has attached.[16] Such overbroad indictments also allow the prosecution to shift its theories to fit the circumstances—a tactic which the prosecution has embraced

15. Public sources show that the government frequently obtains indictments charging nationwide antitrust conspiracies covering time periods many years longer than the statute of limitations period. See 4 CCH Trade Reg. Rep. ¶ 45,073-45,079.

16. Indeed, even a defendant who may not wish to contest the charges has the opportunity only to enter a plea of guilty or *nolo contendere* to the entirety of the conspiracy alleged by the government.

wholeheartedly in this case (see pp. 18-19, fn. 12, *supra*) and which this Court has condemned in the past.[17] Had the prosecution here elected to proceed by separate-count allegations of discrete conspiracies, its position at trial and on appeal would have been materially weaker. Many of its discrete conspiracy charges would have merited dismissal by the trial court for lack of evidence, and the dismissal of those charges would have precluded the jury's consideration of evidence relevant only to the unproven conspiracy charges.

This Court in *Kotteakos* warned emphatically against the danger of "transference of guilt from one to another across the line separating conspiracies," 328 U. S. at 774. In this case the danger of a spill-over of guilt from one disconnected episode to another is markedly greater than in *Kotteakos*. The conspiracy allegation here involved a myriad of unrelated episodes, over 160 claimed co-conspirators, the events of 14 years, and a severe statute of

17. *Cf. Sanabria v. United States, supra,* 437 U. S. 5 at 73 & n. 32:

> "The Government having charged only a single gambling business, the discrete violations of state law which that business may have committed are not severable in order to avoid the Double Jeopardy Clause's bar on retrials for the 'same offense.' Indeed, the Government's argument that these are discrete bases of liability warranting reprosecution following a final judgment of acquittal on one such 'discrete basis' is quite similar to an unsuccessful argument that it presented in *Braverman v. United States,* 317 U. S. 49 (1942).
>
> * * *
>
> A single gambling business theoretically may violate as many laws as a State has prohibiting gambling, and § 1955 specifies six means by which a defendant may illegally participate in such a business, i.e., by conducting, financing, managing, supervising, directing, or owning it. If we were to accept the Government's theory, each of these could be varied, one at a time, to charge a separate count on which a defendant could be prosecuted following acquittals on any of the others."

limitations problem. That sprawling conspiracy charge allowed the prosecution to direct the jury's attention almost exclusively toward events predating the statute of limitations period which were essentially unrelated to any offense which the government might claim to have proven within the limitations period.

The government should not be free to create with impunity such advantages for itself and such adverse consequences for defendants. Just as *Burks* forbids the prosecution two chances to adduce evidence sufficient to prove the charge, it must also forbid the prosecution's successive refinement of a broad charge to meet the evidence. Having chosen, in this case, to charge the defendants with a single sweeping conspiracy, the prosecution must bear the consequences of that tactical decision.[18] The consequence of its failure to prove substantially the offense charged must be the dismissal of that charge.[19] Unless this Court enforces *Burks* in such a situation, the courts (and defendants) will continue to be burdened with trials of needlessly broad indictments drafted by prosecutors who have nothing to lose if their proofs are inadequate.

18. See *United States v. Bertolotti,* 529 F. 2d 149, 151 (2d Cir. 1975), where the Second Circuit reversed a criminal conviction because the government ignored its admonition in *United States v. Sperling,* 506 F. 2d 1323 (2d Cir. 1974) to "cease combining in an alleged single conspiracy, criminal acts loosely, if at all, connected." The same admonition mandates dismissal of the Government's dragnet indictment in the present case. As the Court stated in *United States v. Morado,* 454 F. 2d 167, 170 (5th Cir. 1972), "[h]aving chosen to proceed to trial on the single conspiracy count alone, the Government may not negate its duty to prove the charge laid beyond a reasonable doubt . . . ."

19. In *United States v. Goldstein,* 502 F. 2d 526, 531 (3d Cir. 1974), the court admonished: "[H]aving chosen to utilize the indictment process, fair dealing would require that the government assume the burden as well as the benefits."

IV. Conclusion.

The court of appeals' failure to apply this Court's decision on prior review of this case has effectively nullified that decision. That result will also subject petitioners to an entire replay of their five-month trial in violation of the constitutional protection against double jeopardy announced in *Burks*. Accordingly, a writ of certiorari should issue for review of the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2263/64/65/66

UNITED STATES OF AMERICA
Appellee,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; GEORGIA PACIFIC CORPORATION; KAISER GYPSUM COMPANY, INC.; THE CELOTEX CORPORATION; THE FLINTKOTE COMPANY; GRAHAM J. MORGAN; ANDREW J. WATT; COLON BROWN; J. P. NICELY; WILLIAM H. HUNT; CLAUDE E. HARPER; ROBERT A. COSTA; WILLIAM D. HERBERT; GEORGE J. PECARO; JAMES D. MORAN

UNITED STATES GYPSUM COMPANY,
(D. C. Criminal No. 73-00347-01)
Appellant in *No. 78-2263*

NATIONAL GYPSUM COMPANY,
(D. C. Criminal No. 73-00347-02)
Appellant in *No. 78-2264*

GEORGIA-PACIFIC CORPORATION,
(D. C. Criminal No. 73-00347-03)
Appellant in *No. 78-2265*

THE CELOTEX CORPORATION,
(D. C. Criminal No. 73-00347-05)
Appellant in *No. 78-2266*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued March 15, 1979

Before ADAMS, HUNTER, WEIS, *Circuit Judges*

(Opinion filed May 29, 1979)

(As amended June 14, 1979)

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Opinion of the Court

HUNTER, *Circuit Judge*:

1. The appellants, United States Gypsum Co. (USG), National Gypsum Co. (National), Georgia-Pacific Corp. (G-P), and The Celotex Corp. (Celotex), appeal from the denial of their consolidated motion for judgments of acquittal on the ground of insufficiency of the evidence to support the convictions. They contend that the district court should have granted their motion and, on the authority of *Burks v. United States*, 437 U. S. 1 (1978), should have held that retrial was barred by the double jeopardy clause. Finding sufficient evidence, we affirm.

2. On December 27, 1973 appellants were indicted, along with two other companies and ten individuals not before us, for violating section 1 of the Sherman Act, 15 U. S. C. § 1 (1976). They are alleged to have engaged in a nationwide conspiracy to fix the prices, the terms and conditions of sale, and the methods of handling gypsum board products. The Government charged that the conspiracy began sometime prior to 1960 and continued until the indictment was returned. The indictment listed thirteen means by which the conspiracy was allegedly effected, the most pervasive of which was price verification. Appellants were convicted after a nineteen week trial, and appealed to this court. We reversed the appellants' convictions, though without ruling on the sufficiency of the evidence. 550 F. 2d 115 (3d Cir. 1977). The Government appealed to the United States Supreme Court, which affirmed this court's judgment. 46 U. S. L. W. 4937 (June 29, 1978). The case was remanded to the district court for a new trial.

3. On remand appellants moved for judgments of acquittal, contending that the evidence introduced at the

first trial was insufficient to support the convictions. Their motion was denied on September 7, 1978. Because appellants' original conviction on the charges involved here was reversed on appeal, if the defendants are correct that the evidence tendered at the first trial is insufficient to support a conviction, retrial would subject them to double jeopardy. *Burks v. United States*, 437 U. S. 1 (1978). Consequently, they may appeal the denial of their motion at this juncture, under the "collateral order" exception to the final judgment rule. *See Abney v. United States*, 431 U. S. 651 (1977).

4. In reviewing the denial of a motion for judgment of acquittal on the ground of insufficiency of the evidence to support a conviction, we must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision.[1]

1. Both sides agree that we must test the sufficiency of the evidence using the standards established by the Supreme Court in this case. The Supreme Court held that the jury had been misinstructed in two major areas. First, on the element of intent the Court held that the instruction which allowed the jury in a criminal action under the Sherman Act to presume intent to fix prices from a stabilizing effect was improper. If the Government proves anticompetitive effects, then it must show at the least that the defendant's actions were taken with knowledge that anticompetitive effects would occur. However, in the absence of proof of actual anticompetitive effects, the Government must prove that the defendant's conduct was undertaken with the purpose of producing anticompetitive effects. 46 U. S. L. W. at 4943 & n. 21. *Cf. United States v. Gillen*, No. 78-2082 (3d. Cir., filed May 8, 1978) (Adams, J. concurring).

Second, the Court held that the instruction on withdrawal from the conspiracy was erroneous. The district court had charged the jury that to establish withdrawal, the defendant must either affirmatively notify every other member of the conspiracy or make a disclosure of the illegal scheme to law enforcement officials. The appellants argued that the resumption of intense competitive behavior may be sufficient to establish withdrawal from the conspiracy, but that the district court's instruction precluded that defense. The Court agreed, holding that the taking of affirmative acts

Burk v. United States, 437 U. S. 1, 17 (1978); *Glasser v. United States*, 315 U. S. 60, 80 (1942). Moreover, we are aware that "the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United States v. Patten*, 226 U. S. 525, 544 (1913).

I.

5. The appellants primarily contend that there was presented insufficient evidence of conspiracy in the statutory period to support the conviction, particularly given what they describe as intense price competition beginning immediately prior to the statutory period.[2] We focus our attention on that argument.

6. The gist of the crime of conspiracy to violate the Sherman Act is the agreement itself. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 252 (1940). No overt acts need be alleged or proved: "[I]t does not make the doing of any act other than the act of conspiring a condition of liability." *Nash v. United States*, 229 U. S. 373, 378 (1913). To determine whether the conspiracy is a continuing one, we must look to the scope of the agreement allegedly entered into by the parties. *Fiswick v. United States*, 329 U. S. 211, 216 (1946). *See Grunewald v. United States*, 353 U. S. 391, 397 (1957). The Supreme Court in *United States v. Kissel*, 218 U. S. 601, 607 (1910),

1. (Cont'd.)
inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach the co-conspirators is sufficient to show withdrawal. 46 U. S. L. W. at 4948-49. In reviewing the sufficiency of the evidence, we will apply the standards as enunciated by the Supreme Court.

2. The statute of limitations in a criminal antitrust action is five years. 18 U. S. C. § 3282 (1976). Since the indictment was returned on December 27, 1973, the statutory period began on December 27, 1968.

defined a continuous conspiracy as one that "contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up." The conspiracy charged here, to maintain high and stable prices, certainly fits that test.

7. The appellants would have us hold that the Government is limited in the proof of its case solely to those events which occurred during the statutory period. In the context of a continuing conspiracy, we do not believe that the Government is so limited. When the conspiracy is alleged to have been formed prior to the statutory period, the issue becomes one of continuation. We agree with the Second Circuit that "the Government must produce evidence justifying the jury in finding beyond a reasonable doubt that the particular agreement into which a defendant entered continued into the period not barred by limitation." *United States v. Borelli*, 336 F. 2d 376, 385 (2d Cir. 1964), *cert. denied*, 379 U. S. 960 (1965). There is no requirement that the Government prove a new agreement in the statutory period. *United States v. Kissel*, 218 U. S. 601 (1910). Moreover, the "overt act of one partner may be the act of all without any new agreement specifically directed to that act." *Id.* at 607. *See United States v. Nowak*, 448 F. 2d 134, 139 (7th Cir. 1971). This court discussed the utility of pre-statutory period evidence to prove a conspiracy in *United States v. Johnson*, 165 F. 2d 42 (3d Cir. 1947), *cert. denied*, 332 U. S. 852 (1948). There, the defendants were charged under 18 U. S. C. § 371 (1976) with conspiracy to obstruct the administration of justice. In finding sufficient evidence to support the conviction we held: "Some of the acts necessarily occurred [prior to the statutory period], but these acts could be proved to show the existence and continuance of the conspiracy even though there could have been no prosecution for any substantive offense charged as an overt act." *Id.* at 45.

8. Here, we find sufficient acts in furtherance of the conspiracy committed in the statutory period to justify a jury in concluding that the agreement continued therein. The Government's proof of conspiracy rested heavily on the practice of price verification. The defendants' own recitation of the facts reveals various incidents of price verification in the statutory period. *See* Appellants Brief at 34-41. The testimony discloses that Kenneth H. Atwell and Charles D. Webster, Vice President and Administrative Assistant respectively of National's Sales Administration, engaged in numerous verification contacts after December 27, 1968. These apparently involved both price and credit term verifications. Also, the management of G-P did not instruct its branch managers to discontinue verification until February, 1969. Certainly, the jury could infer that the conspiracy continued until that time. Moreover, O. E. Burch, General Sales Manager of G-P, had numerous contacts with competitors between June 1969 and 1972. The testimony also discloses that Celotex continued verifying until 1973.[3]

9. Finally, the appellants attempt to show abandonment of the conspiracy by demonstrating that the gypsum board industry was experiencing intensive price competition beginning in 1967. They argue that the resumed price

3. Because we have used the appellants' version of the facts, our discussion of the incidents of verification in the statutory period has omitted any mention of USG. To support its contention that it had ceased verification in 1968, USG relies on testimony of Andrew J. Watt, Executive Vice-President of USG and Joseph L. Baldwin, Jr., Director of Marketing Policy of USG. The Government, on the other hand, points to evidence which could lead a jury to disbelieve the Watts-Baldwin testimony. It also cites us to testimony by Rhyne Simpson, Jr., President of Republic Gypsum, which indicates that verification by USG continued into the statutory period.

competition proves as a matter of law that they had abandoned any anticompetitive conspiracy at least two years prior to the statutory period. The Supreme Court in *United States v. Container Corp.*, 393 U. S. 333 (1969), pointed out, however, that "[t]he continuation of some price competition is not fatal to the Government's case. The limitation or reduction of price competition brings the case within the ban . . . ." *Id.* at 337, *citing United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 224 & n. 59 (1940). Moreover, the Government contends that the stepped-up price competition did not commence until at least 1970. While not presenting expert testimony of its own, the Government pointed to shortcomings in the testimony of the defendants' expert which would justify the jury in rejecting it.

10. Therefore, we find sufficient evidence from which the jury could have concluded that the conspiracy continued into the statutory period.

II.

11. The appellants argue that unless there is sufficient evidence within the statutory period on each of the three separately stated objectives and each of the thirteen specific means charged in the indictment, they are entitled to a judgment of acquittal. The indictment charges the defendants with conspiracy to a) raise, fix, maintain and stabilize the prices of gypsum board; b) fix, maintain, and stabilize the terms and conditions of sale thereof; and c) adopt and maintain uniform methods of packaging and handling such gypsum board.

12. First, the failure of the government to prove that the defendants engaged in each of the thirteen specific means is not fatal. In *United States v. Adamo,* 534 F. 2d 31, 38 (3d Cir.), *cert. denied,* 429 U. S. 841 (1976), we

held that "the Government is under no obligation to prove every overt act alleged." *See Nash v. United States,* 229 U. S. 373, 380 (1913) (in criminal antitrust actions, "not all the means alleged need be proved"). Nor is the Government limited in its proof to these overt acts alleged in the indictment. *United States v. Adamo,* 534 F. 2d at 38.

13. Second, the three allegedly distinct objectives of the conspiracy are not separate. Rather, it is and has been the Government's theory that the second and third objectives—to fix, maintain, and stabilize the terms and conditions of sale and to adopt and maintain uniform methods of packaging and handling of gypsum products—are integral parts of the first. Moreover, the district court charged the jury without objection by the defendants that any agreement to fix the methods of handling gypsum board would not be illegal unless it had the purpose or effect of stabilizing prices. App. at 3885a-86a. Further, the court charged that the terms and conditions of sale are really components of price. App. at 3900a. The consistent theory of the Government's case is that the defendants had engaged in a conspiracy "with a single common design and objective—that of maintaining high and stable prices." Brief for Government at 10. *See* Addendum to Brief for Government at 15. Given, then, that a single unitary conspiracy was alleged, the holdings of this court in *United States v. Tarnopol,* 561 F. 2d 466 (3d Cir. 1977), and *United States v. Dansker,* 537 F. 2d 40 (3d Cir. 1976), *cert. denied,* 429 U. S. 1038 (1977), are not applicable.

III.

14. The focus of this opinion has been on whether the jury could find that the conspiracy continued into the statutory period. We have, as well, reviewed the record and find sufficient evidence on each element of the offense

to support the jury's guilty verdict.[4] Therefore, the order of the district court denying the defendants' motion for judgment of acquittal on the ground of insufficiency of the evidence to support the conviction will be affirmed and the case remanded for a new trial.

4. One note about the element of intent is necessary. The Supreme Court held that the instruction requiring the jury to presume intent from effect on prices was erroneous. 46 U. S. L. W. at 4944. *See* note 1 *supra*. On this appeal, the Government appears virtually to have abandoned any contention of anticompetitive effects other than making the conclusory statement that "[t]hese price exchanges had the tendency to moderate the number and degree of competitive deviations and arrest the downward trend of price level." Brief for Appellee at 16. *See* 46 U. S. L. W. at 4947 ("Regardless of its putative purpose, the most likely consequence of any such agreement to exchange price information would be the stabilization of industry prices."). *See also* United States v. Container Corp., 393 U. S. 333 (1969) (anticompetitive effect of exchange of price information inferred from market structure). The Government presented no expert testimony at trial to establish anticompetitive effects.

Instead, the Government has relied in this appeal on evidence of anticompetitive purpose under the Supreme Court's elevated standard. 46 U. S. L. W. at 4943 n. 21. The Government points to testimony by several company executives to the effect that verification was engaged in with the purpose of insuring market stability and avoiding destruction of the market. *See, i.e.*, Testimony of A. L. Meyer, Director of Marketing Services of G-P, App. at 1456a; Testimony of Kenneth H. Atwell, Vice-President of Sales Administration at National, App. at 1695a-97a; Testimony of Henry C. Bear and R. C. Gimlin, Vice-Presidents of Merchandizing at USG, App. at 548a-49a and 1121a; and Testimony of Homer D. Jarrett, General Credit Manager of Celotex, App. at 2034a-35a. We believe that the record would support a jury finding of anticompetitive purpose.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2263, 78-2264, 78-2265 and 78-2266

UNITED STATES OF AMERICA

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; GEORGIA PACIFIC CORPORATION; KAISER GYPSUM COMPANY, INC.; THE CELOTEX CORPORATION; THE FLINTKOTE COMPANY; GRAHAM J. MORGAN; ANDREW J. WATT; COLON BROWN; J. P. NICELY; WILLIAM H. HUNT; CLAUDE E. HARPER, ROBERT A. COSTA; WILLIAM D. HERBERT; GEORGE J. PECARO; JAMES D. MORAN

United States Gypsum Company,
Appellant in *No. 78-2263*

National Gypsum Company,
Appellant in *No. 78-2264*

Georgia-Pacific Corporation,
Appellant in *No. 78-2265*

The Celotex Corporation,
Appellant in *No. 78-2266*

(D. C. Criminal Nos. 73-00347-01/02/03/05)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, HUNTER and WEIS, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on March 15, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed September 7, 1978, which order denied defendants' motion for judgment of acquittal on the ground of insufficiency of the evidence to support the conviction be, and the same is hereby affirmed, and the cause remanded for a new trial, in accordance with the opinion of this Court.

ATTEST:

Thomas F. Quinn
CLERK

May 29, 1979

APPENDIX B.

Written Question Distributed by the Court of Appeals at Oral Argument.

The government's thesis, as framed in the single count indictment, is that from sometime around 1960 and until 1973, the defendants engaged in a single, unitary, continuing, nationwide conspiracy in violation of § 1 of the Sherman Act. The indictment lists three principal objectives of this conspiracy:

(1) to raise, fix, maintain and stabilize the prices of gypsum board;

(2) to fix, maintain and stabilize the terms and conditions of sale thereof; and

(3) to adopt and maintain uniform methods of packaging and handling gypsum board.

In addition, the indictment lists 13 specific types of activities and 4 effects of the conspiracy.

A lot of evidence has been introduced at trial, and the question now before this Court is whether the government's evidence, when viewed in the light most favorable to the government, is sufficient to enable a reasonable jury to arrive at a finding of guilt beyond a reasonable doubt.

Both the defendants' briefs and the government's brief ably dealt with the massive record as it relates to this question, but to my understanding, neither brief has given this Court guidance as to what it should do if it concludes that there is sufficient evidence to support a conviction for violation of § 1 of the Sherman Act, but that there is insufficient evidence to establish a conspiracy of the full magnitude and scope charged in the indictment. For

example, what if we conclude that there is sufficient evidence to support a conviction for stabilizing prices, but not for raising prices or for fixing the terms and conditions of sale? Or, to give another example, what if we conclude that there is sufficient evidence as to all the objectives charged in the indictment, but that the evidence is insufficient on six of the thirteen specific acts charged, or that there is no evidence as to any of the 4 effects changed? Must we in any or all of these possible situations conclude that the evidence is insufficient to support a conviction, and held that a retrial is barred under the double jeopardy clause?

Is it appropriate for us instead to consider the indictment as charging multiple conspiracies and permit a retrial on the theory or theories that we believe may be supported by sufficient evidence? Or. perhaps, may we hold that if there is sufficient evidence as to any part of the charged conspiracy, which part by itself would constitute a violation of the Sherman Act, the government may retry the entire case on the broad theory on which it first tried the matter?

APPENDIX C.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 73-347

UNITED STATES OF AMERICA,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; GEORGIA-PACIFIC CORPORATION; THE CELOTEX CORPORATION, *Defendants.*

Memorandum Opinion and Order.

Defendants were convicted under Section 1 of the Sherman Act. The United States Court of Appeals for the Third Circuit vacated the convictions and returned the case to this Court for a new trial. The government petitioned the Supreme Court for certiorari and review was granted. The Supreme Court affirmed the Court of Appeals' decision with certain modifications in the *ratio decidendi.* Before this Court once again for the new trial, defendants have now moved for judgment of acquittal on the grounds of insufficient evidence. The Court of Appeals denied defendants' motion for judgment of acquittal without prejudice to the submission to the trial court of a motion for judgment of acquittal.

Defendants' position simply stated is that no court to this time has reviewed the trial record in light of the law of the case to determine whether or not the government presented sufficient evidence to submit the matter to the jury. Defendants' contention is that the government evidence is insufficient when scrutinized in the context of the recent Supreme Court review of the instant case. The evidence being insufficient, it is contended that retrial is prohibited by the Double Jeopardy Clause. *Burks v. United States,* 46 U. S. L. W. 4632 (U. S. June 14, 1978); *Greene v. Massey,* 46 U. S. L. W. 4636 (U. S. June 14, 1978).

The Court has considered the Third Circuit Court of Appeals' Opinion, the Opinion of the United States Supreme Court, the motion for judgment of acquittal and briefs related thereto, views expressed at oral argument on the instant motion and evidence introduced at trial. After evaluating all of the above to the best of the Court's ability and viewing the evidence in the light most favorable to the government, as must be done, this Court believes that there was sufficient evidence introduced at the first trial to sustain the convictions under the redefined legal standards promulgated by the United States Supreme Court. Specifically, there was sufficient evidence of criminal intent and conspiratorial involvement to support guilty verdicts.

The decision to deny defendants' motion for judgment of acquittal is solely predicated upon the continued existence of sufficient evidence for conviction under the Supreme Court's redefinition of the law.[1] Nonetheless, a few brief comments are in order as to whether or not the Double Jeopardy Clause would be violated even if there

1. The government stated at oral argument that it preferred the case *sub judice* to be decided solely with reference to the presence or absence of sufficient evidence as judged under the Supreme Court's post-trial Opinion. Defendants similarly agreed to such a basis for disposition.

were not sufficient evidence under the reformulated standards.

It has long been recognized that retrial does not run afoul of the Constitution where reversal is based upon trial error. *United States v. Tateo,* 377 U. S. 463 (1964); *United States v. Ball,* 163 U. S. 662 (1896). Only recently, however, the Supreme Court has indicated that the Double Jeopardy Clause will not permit retrial where the government's case suffers from insufficiency of evidence. *Burks, supra* and *Greene, supra.* The case *sub judice* possesses a blend of both characteristics. The Supreme Court, without forewarning to the prosecution, the defendants, this Court or the United States Court of Appeals for the Third Circuit, redefined the applicable law in certain particulars of the instant case which would normally necessitate a new trial. Defendants, however, contend that the lack of sufficient evidence at the first trial, as measured by the subsequently reformulated standards, precludes such a new trial. Assuming *arguendo* lack of sufficient evidence for conviction, the government's failure to supply such proof may have been caused by its inability to predict the Supreme Court's post-trial requirements at the time of the first trial.[2] Under such a circumstance it is difficult to say that the government is getting a second bite at the same apple. While *stare decisis* provides no discernible assistance, this Court doubts very seriously whether retrial would be proscribed by the Double Jeopardy Clause under these circumstances even if there were insufficient evidence of record from the first trial.

An appropriate Order will issue.

/s/ Hubert I. Teitelbaum
Hubert I. Teitelbaum
United States District Judge

2. This situation was not present in either *Burks* or *Greene.*

Order.

And Now, this 7th day of September, 1978, in accordance with the foregoing Opinion, It Is Ordered that defendants' motion for judgment of acquittal is hereby denied.

/s/ Hubert I. Teitelbaum
Hubert I. Teitelbaum
United States District Judge

APPENDIX D.

SUPREME COURT OF THE UNITED STATES.

UNITED STATES *v.* UNITED STATES GYPSUM CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76-1560. Argued March 1, 1978—Decided June 29, 1978.

Deputy Solicitor General Friedman argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Shenefield, Frank H. Easterbrook, Robert B. Nicholson, Rodney O. Thorson,* and *Robert J. Wiggers.*

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* A brief of *amici curiae* urging reversal was filed for their respective States by *Evelle J. Younger,* Attorney General of California, *Sanford N. Gruskin,* Chief Assistant Attorney General, *Warren J. Abbott,* Assistant Attorney General, *Michael I. Spiegel* and *Charles M. Kagay,* Deputy Attorneys General; *William J. Baxley,* Attorney General of Alabama, *Thomas Troy Zieman, Jr., Jerry L. Weidler,* and *Susan Beth Farmer,* Assistant Attorneys General; *Bruce E. Babbitt,* Attorney General of Arizona, and *Alison B. Swan,* Assistant Attorney General; *J. D. McFarlane,* Attorney General of Colorado, and *Robert F. Hill,* First Assistant Attorney General; *Carl R. Ajello,* Attorney General of Connecticut; *Theodore L. Sendak,* Attorney General of Indiana; *Curt Schneider,* Attorney General of Kansas, and *Thomas W. Regan,* Assistant Attorney General; *William J.*

Opinion of the Court.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents the following questions: (a) whether intent is an element of a criminal antitrust offense; (b) whether an exchange of price information for purposes of compliance with the Robinson-Patman Act is exempt from Sherman Act scrutiny; (c) the adequacy of jury instructions on membership in and withdrawal from the alleged conspiracy; and (d) the propriety of an *ex parte* meeting between the trial judge and the foreman of the jury.

I

Gypsum board, a laminated type of wallboard composed of paper, vinyl, or other specially treated coverings over a gypsum core, has in the last 30 years substantially replaced wet plaster as the primary component of interior walls and ceilings in residential and commercial construction. The product is essentially fungible; differences in price, credit terms, and delivery services largely dictate the

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Guste, Jr., Attorney General of Louisiana; *Francis B. Burch*, Attorney General of Maryland; *John Ashcroft*, Attorney General of Missouri; *William F. Hyland*, Attorney General of New Jersey; *Toney Anaya*, Attorney General of New Mexico; *Louis J. Lefkowitz*, Attorney General of New York, and *John M. Desiderio*, Assistant Attorney General; *Rufus L. Edmisten*, Attorney General of North Carolina, and *David S. Crump*, Special Deputy Attorney General; *James A. Redden*, Attorney General of Oregon, and *Stephen L. Dunne; John L. Hill*, Attorney General of Texas; *Robert B. Hansen*, Attorney General of Utah; *M. Jerome Diamond*, Attorney General of Vermont; *Anthony F. Troy*, Attorney General of Virginia; *Slade Gorton*, Attorney General of Washington, and *Thomas L. Boeder*, Assistant Attorney General; *Bronson C. LaFollette*, Attorney General of Wisconsin, and *Michael L. Zaleski*, Assistant Attorney General.

Stanley T. Kaleczyc, Lawrence B. Kraus, and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae*.

purchasers' choice between competing suppliers. Overall demand, however, is governed by the level of construction activity and is only marginally affected by price fluctuations.

The gypsum board industry is highly concentrated, with the number of producers ranging from 9 to 15 in the period 1960-1973. The eight largest companies accounted for some 94% of the national sales with the seven "single-plant producers" [1] accounting for the remaining 6%. Most of the major producers and a large number of the single-plant producers are members of the Gypsum Association which since 1930 has served as a trade association of gypsum board manufacturers.

A

Beginning in 1966, the Justice Department, as well as the Federal Trade Commission, became involved in investigations into possible antitrust violations in the gypsum board industry. In 1971, a grand jury was empaneled and the investigation continued for an additional 28 months. In late 1973, an indictment was filed in the United States District Court for the Western District of Pennsylvania charging six major manufacturers and various of their corporate officials with violations of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1.[2]

1. The major producers operate numerous plants to serve a wide range of geographical markets. The single-plant producers are limited in terms of the markets they can serve because of the difficulties and expense involved in long-distance transportation of gypsum board.

2. The corporate defendants named in the indictment were: United States Gypsum Co., National Gypsum Co., Georgia Pacific Corp., Kaiser-Gypsum Co., Inc., the Celotex Corp., and the Flintkote Co. The individual defendants included: the Chairman of the Board and the Executive Vice-President of the United States Gypsum, the Chairman of the Board and Vice-President for Sales of National Gypsum, the President of Georgia Pacific, the President

The indictment charged that the defendants had engaged in a combination and conspiracy "[b]eginning sometime prior to 1960 and continuing thereafter at least until sometime in 1973," App. 34, in restraint of interstate trade and commerce in the manufacture and sale of gypsum board. The alleged combination and conspiracy consisted of:

> "[A] continuing agreement understanding and concert of action among the defendants and co-conspirators to (a) raise, fix, maintain and stabilize the prices of gypsum board; (b) fix, maintain and stabilize the terms and conditions of sale thereof; and (c) adopt and maintain uniform methods of packaging and handling such gypsum board." *Ibid.*

The indictment proceeded to specify some 13 types of actions taken by conspirators "[i]n formulating and effectuating" the combination and conspiracy, the most relevant of which, for our purposes, is specification (h) which alleged that the conspirators

> "telephoned or otherwise contacted one another to exchange and discuss current and future published or market prices and published or standard terms and conditions of sale and to ascertain alleged deviations therefrom."

The bill of particulars provided additional details about the continuing nature of the alleged exchanges of competitive information and the role played by such exchanges in

2. (Cont'd.)
and the Vice-President and General Manager of Kaiser-Gypsum, the President of Celotex, and the Chairman of the Board and the President of Flintkote. The Gypsum Association was named as an unindicted co-conspirator as were two other gypsum board producers —Johns-Manville Corp. and Fibreboard Corp.

policing adherence to the various other illegal agreements charged.

B

The first skirmish in the protracted litigation of this case was a motion for dismissal filed by the defendants alleging that their due process rights had been denied because of unreasonable preindictment delay. The District Court, after holding a five-day evidentiary hearing on the motion, concluded that there was "no evidence of unreasonable delay on the part of the Government," 383 F. Supp. 462, 470 (WD Pa. 1974), and that the defendants were not "prejudiced to any extraordinary degree whatsoever by the chain of events leading to this indictment." *Ibid.* The District Court denied a motion to dismiss the indictment. Thereafter, nine of the defendants entered pleas of *nolo contendere* and were sentenced.[3] The trial of the remaining seven defendants commenced on March 3, 1975, and lasted some 19 weeks.

The focus of the Government's price-fixing case at trial was interseller price verification—that is, the practice allegedly followed by the gypsum board manufacturers of telephoning a competing producer to determine the price currently being offered on gypsum board to a specific customer. The Government contended that these price exchanges were part of an agreement among the defendants, had the effect of stabilizing prices and policing agreed-upon price increases, and were undertaken on a frequent basis until sometime in 1973. Defendants disputed both the scope and duration of the verification activities, and further maintained that those exchanges of price informa-

3. The remaining corporate defendants were United States Gypsum, National Gypsum, Georgia Pacific, and Celotex, and the remaining individual defendants were the Chairman of the Board and the Vice-President of Sales of National Gypsum and the Executive Vice-President of United States Gypsum.

tion which did occur were for the purposes of complying with the Robinson-Patman Act[4] and preventing customer fraud. These purposes, in defendants' view, brought the disputed communications among competitors within a "controlling circumstance" exception to Sherman Act liability—at the extreme, precluding, as a matter of law, consideration of verification by the jury in determining defendants' guilt on the price-fixing charge, and at the minimum, making the defendants' purposes in engaging in such communications a threshold factual question.

The instructions on the verification issue given by the trial judge provided that if the exchanges of price information were deemed by the jury to have been undertaken "in a good faith effort to comply with the Robinson-Patman Act," verification standing alone would not be sufficient to establish an illegal price-fixing agreement. The paragraphs immediately following, however, provided that the purpose was essentially irrelevant if the jury found that the effect of verification was to raise, fix, maintain, or stabilize prices. The instructions on verification closed with the observation:

> "The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result."

The aspects of the charge dealing with the Government's burden in linking a particular defendant to the con-

4. Defendants contended that the exchange of price information or verification was necessary to enable them to take advantage of the meeting-competition defense contained in § 2(b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13(b) (1976 ed.); see Part III, *infra*.

spiracy, and the kinds of evidence the jury could properly consider in determining if one or more of the alleged conspirators had withdrawn from or abandoned the conspiracy were also a subject of some dispute between the judge and defense counsel. On the former, the disagreement was essentially over the proper specificity of the charge. Defendants requested a charge directing the jury to determine "what kind of agreement or understanding, if any, existed as to each defendant" before any could be found to be a member of the conspiracy. The trial judge was unwilling to give this precise instruction and instead emphasized at several points in the charge the jury's obligation to consider the evidence regarding the involvement of each defendant individually, and to find, as a precondition to liability, that each defendant was a knowing participant in the alleged conspiracy.[5]

On the matter of withdrawal from the conspiracy, defendants sought an instruction stating explicitly that evidence of vigorous price competition during the period covered by the indictment could be considered by the jury as indicating abandonment of the charged conspiracy by one or more of the defendants. Substantial evidence on this subject had been presented by the defendants in the course of the trial. The judge again was unwilling to accept defendants' construction of the applicable law and substituted an instruction specifying that withdrawal had to be established by either affirmative notice to each other member of the conspiracy or by disclosure of the illegal enterprise to law enforcement officials. The trial judge allowed the defendants to argue their theory of withdrawal to the jury despite his unwillingness to refer to it explicitly in his charge.

5. Relevant portions of the charge dealing with this issue are excerpted in the opinion of the Court of Appeals. 550 F. 2d 115, 127 n. 12 (1977); *id.*, at 137-138 (Weis, J., dissenting).

C

The jury retired to deliberate early on the evening of Tuesday, July 8, 1975. Supplemental instructions were given in response to questions from the jury on Wednesday and Thursday, and the hours of deliberation were shortened on Friday after the court was informed that some of the jurors were exhausted and not feeling well. On Saturday, after responding to further requests from the jury, the judge, *sua sponte*, in open court, used the supplemental instruction approved by the Court of Appeals[6] to remind the jurors of their obligation to continue the deliberations. Essentially the same instruction was given to the jury again on Sunday, after the judge had received a note detailing the jury's inability to reach a unanimous verdict.

On Monday, the court received yet another note from the jury, this time stating that the foreman wished to "discuss the condition of the Jury" and to "[seek] further guidance" from the judge. The judge suggested to counsel that he confer privately with the foreman and that a transcript of the meeting be kept but impounded. The judge indicated that if his suggestion was rejected he would simply deny the foreman's request for the meeting. In response to questions from counsel, the judge stated that the purpose of the meeting would be to determine if the jury was in serious physical condition, and he further indicated that no instructions on the law would be given to the foreman without calling in the jury and instructing them in open court with counsel present.[7] After further

6. See *United States v. Fioravanti,* 412 F. 2d 407 (CA 3), cert. denied *sub nom. Panaccione v. United States,* 396 U. S. 837 (1969).

7. The judge observed that the only instruction he might give the foreman was "to go back and continue his deliberations." App. 1823.

discussion, all counsel agreed, albeit somewhat reluctantly, to the proposed meeting.

Most of the discussion between the jury foreman and the judge concerned the deteriorating state of health of the jurors after almost five months on the case followed by five days of intensive deliberations and the existence of personality conflicts among the members of the panel. The foreman also stressed at least twice during the conversation with the judge his belief that the jury was unable to reach a verdict and that further discussion would not eliminate the disagreements which existed. The judge indicated that while he would take into consideration what the foreman had said, he wanted the jury to continue its deliberation. Near the close of the meeting, the following colloquy took place:

> "THE COURT. I would like to ask the jurors to continue their deliberations and I will take into consideration what you have told me. That is all I can say.
>
> "MR. RUSSELL. I appreciate it. It is a situation I don't know how to help you get what you are after.
>
> "THE COURT. Oh, I am not after anything.
>
> "MR. RUSSELL. You are after a verdict one way or the other.
>
> "THE COURT. Which way it goes doesn't make any difference to me."[8]

Shortly thereafter, the foreman returned to the jury room and deliberations continued. The judge then informed counsel, in abbreviated fashion, what had transpired at the meeting with the foreman, and of his direc-

8. The complete colloquy between the foreman and the judge is reproduced as an appendix to this opinion.

tion that the deliberations continue.[9] Defense counsel asked to see the transcript of the *in camera* meeting and moved for a mistrial because of the jury's apparent deadlock. These requests were denied,[10] although the judge indicated that if no verdict were rendered by the following Friday, he would then reconsider the mistrial motions. The following morning, the jury returned guilty verdicts against each of the defendants.

D

The Court of Appeals for the Third Circuit reversed the convictions. 550 F. 2d 115 (1977). The panel was unanimous in its rejection of the claim of preindictment delay, but divided over the proper disposition of the remaining issues.

Two judges agreed that the trial judge erred in instructing the jury that an effect on prices resulting from an agreement to exchange price information made out a Sherman Act violation regardless of whether respondents' sole purpose in engaging in such exchanges was to establish a defense to price-discrimination charges. Instead, they regarded such a purpose, if certain conditions were met,[11] as constituting a "controlling circumstance" which,

9. "Significantly, the judge did not tell counsel about the foreman's opinion that the jury was hopelessly deadlocked; did not indicate that the foreman was under the impression that the court wanted a definite verdict either for the prosecution or the defendants; and did not mention the directive to the jury that it should 'see if [it] can come to a verdict.'" 550 F. 2d, at 132 (Adams, J., concurring).

10. After the conclusion of the trial, the Court of Appeals ordered the transcript of the meeting between the judge and the foreman released to counsel to aid them in preparation of the appeal.

11. "Therefore, appellants were entitled to an instruction that their verification practice would not violate the Sherman Act if the jury found: (1) the appellants engaged in the practice solely to comply with the strictures of Robinson-Patman; (2) they had first

under *United States v. Container Corp.*, 393 U. S. 333 (1969), would excuse what might otherwise constitute an antitrust violation. One judge considered the instructions regarding the purpose and scope of the conspiracy and the kinds of conduct necessary to demonstrate a withdrawal therefrom to be infirm, while another concluded that the convictions should be reversed because the trial judge "improperly induced" the jury into reaching a verdict during the *in camera* conversation with the foreman.

One judge, in dissent, would have sustained the convictions. He regarded the charge on verification to be consistent with *Container Corp.*, and rejected the notion that the Robinson-Patman Act required the exchange of price information even in the limited circumstances identified by the majority. Neither of the alleged infirmities in the general conspiracy instructions, in his view, afforded any basis for reversal, and he disagreed with the characterization of the trial judge's conduct as coercing a verdict.

We granted certiorari, 434 U. S. 815 (1977), and we affirm.

II

We turn first to consider the jury instructions regarding the elements of the price-fixing offense charged in the indictment. Although the trial judge's instructions on the price-fixing issue are not without ambiguity, it seems reasonably clear that he regarded an effect on prices as the crucial element of the charged offense. The jury was instructed that if it found interseller verification had the

11. (Cont'd.)
resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; and (4) their communication with competitors was strictly limited to the one price and one buyer at issue." *Id.*, at 126.

effect of raising, fixing, maintaining, or stabilizing the price of gypsum board, then such verification could be considered as evidence of an agreement to so affect prices. They were further charged, and it is this point which gives rise to our present concern, that "if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, *as a matter of law,* to have intended that result." App. 1722. (Emphasis added.)

The Government characterizes this charge as entirely consistent with "this Court's long-standing rule that an agreement among sellers to exchange information on current offering prices violates Section 1 of the Sherman Act if it has either the purpose or the effect of stabilizing prices," Reply Brief for United States 1, and relies primarily on our decision in *United States v. Container Corp., supra,* a civil case, to support its position. See also *American Column & Lumber Co. v. United States,* 257 U. S. 377 (1921); *United States v. American Linseed Oil Co.,* 262 U. S. 371 (1923); *Maple Flooring Mfg. Assn. v. United States,* 268 U. S. 563 (1925); *Cement Mfrs. Protective Assn. v. United States,* 268 U. S. 588 (1925). In this view, the trial court's instructions would not be erroneous, even if interpreted, as they were by the Court of Appeals, to *direct* the jury to convict if it found that verification had an effect on prices, regardless of the purpose of the respondents. The Court of Appeals rejected the Government's "effects alone" test, holding instead that in certain limited circumstances, a purpose of complying with the Robinson-Patman Act would constitute a controlling circumstance excusing Sherman Act liability, and hence an instruction allowing the jury to ignore purpose could not be sustained.

We agree with the Court of Appeals that an effect on prices, without more, will not support a criminal conviction under the Sherman Act, but we do not base that conclusion on the existence of any conflict between the requirements of the Robinson-Patman and the Sherman Acts.[12] Rather, we hold that a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices. Cf. *Morissette v. United States,* 342 U. S. 246, 274-275 (1952). Since the challenged instruction, as we read it, had this prohibited effect, it is disapproved. We are unwilling to construe the Sherman Act as mandating a regime of strict-liability criminal offenses.[13]

A

We start with the familiar proposition that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States,* 341 U. S. 494, 500 (1951). See also *United States v. Freed,* 401 U. S. 601, 613 (1971) (BRENNAN, J., concurring in judgment); *United States v. Balint,* 258 U. S. 250, 251-253 (1922). In a much-cited passage in *Morissette v. United States, supra,* at 250-251, Mr. Justice Jackson speaking for the Court observed:

12. See Part III, *infra.*

13. Our analysis focuses solely on the elements of a criminal offense under the antitrust laws, and leaves unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect. See *United States v. Container Corp.,* 393 U. S. 333, 337 (1969); *id.,* at 341 (MARSHALL, J., dissenting). Of course, consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct. See *Chicago Board of Trade v. United States,* 246 U. S. 231, 238 (1918).

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.'" (Footnotes omitted.)

Although Blackstone's requisite "vicious will" has been replaced by more sophisticated and less colorful characterizations of the mental state required to support criminality, see ALI, Model Penal Code § 2.02 (Prop. Off. Draft 1962), intent generally remains an indispensable element of a criminal offense. This is as true in a sophisticated criminal antitrust case as in one involving any other criminal offense.

This Court, in keeping with the common-law tradition and with the general injunction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Rewis v. United States,* 401 U. S. 808, 812 (1971), has on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide. See, *e.g., Morissette v. United States, supra.* Cf. *Lambert v. California,* 355 U. S. 225 (1957). Indeed, the holding in *Morissette* can be fairly read as establishing, at least with regard to crimes having their origin in the common law, an interpretative presumption that *mens rea* is required. "[M]ere omission . . . of intent [in the statute] will not be construed as eliminating that element from the crimes denounced"; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and "absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them." 342 U. S., at 263.

While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, see *Shevlin-Carpenter Co. v. Minnesota,* 218 U. S. 57 (1910), the limited circumstances in which Congress has created and this Court has recognized such offenses, see *e.g., United States v. Balint, supra; United States v. Behrman,* 258 U. S. 280 (1922); *United States v. Dotterweich,* 320 U. S. 277 (1943); *United States v. Freed, supra,* attest to their generally disfavored status. See generally ALI, Model Penal Code, Comment on § 2.05, p. 140 (Tent. Draft No. 4, 1955); W. LaFave & A. Scott, Criminal Law 222-223 (1972). Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement. In the context of the Sherman Act, this generally inhospitable attitude to non-*mens rea* offenses is reinforced by an array of considerations arguing against treating antitrust violations as strict-liability crimes.

B

The Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely

identify the conduct which it proscribes.[14] Both civil remedies and criminal sanctions are authorized with regard to the same generalized definitions of the conduct proscribed—restraints of trade or commerce and illegal monopolization—without reference to or mention of intent or state of mind. Nor has judicial elaboration of the Act always yielded the clear and definitive rules of conduct which the statute omits; instead open-ended and fact-specific standards like the "rule of reason" have been applied to broad classes of conduct falling within the purview of the Act's general provisions. See, *e.g.*, *Standard Oil v. United States*, 221 U. S. 1, 60 (1911); *United States v. Topco Associates*, 405 U. S. 596, 607 (1972); *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U. S. 36, 49 (1977). Simply put, the Act has not been interpreted as if it were primarily a criminal statute; it has been construed to have a "generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 359-360 (1933). See generally 2 P. Areeda & D. Turner, Antitrust Law § 310 (1978).

Although in *Nash v. United States*, 229 U. S. 373, 376-378 (1913), the Court held that the indeterminacy of the Sherman Act's standards did not constitute a fatal constitutional objection to their criminal enforcement, nevertheless, this factor has been deemed particularly relevant by those charged with enforcing the Act in accommodating its criminal and remedial sanctions. The 1955 Report of

14. Senator Sherman adverted to the open texture of the statutory language in 1890 and accurately forecast its consequence—a central role for the courts in giving shape and content to the Act's proscriptions.

"I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law . . . ." 21 Cong. Rec. 2460 (1890).

the Attorney General's National Committee to Study the Antitrust Laws concluded that the criminal provisions of the Act should be reserved for those circumstances where the law was relatively clear and the conduct egregious:

> "The Sherman Act, inevitably perhaps, is couched in language broad and general. Modern business patterns moreover are so complex that market effects of proposed conduct are only imprecisely predictable. Thus, it may be difficult for today's businessman to tell in advance whether projected actions will run afoul of the Sherman Act's criminal strictures. With this hazard in mind, we believe that criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade." Report of the Attorney General's National Committee to Study the Antitrust Laws 349 (1955).

The Antitrust Division of the Justice Department took a similar, though slightly more moderate, position in its enforcement guidelines issued contemporaneously with the 1955 Report of the Attorney General's Committee:

> "In general, the following types of offenses are prosecuted criminally: (1) price fixing; (2) other violations of the Sherman Act where there is proof of a specific intent to restrain trade or to monopolize; (3) a less easily defined category of cases which might generally be described as involving proof of use of predatory practices (boycotts for example) to accomplish the objective of the combination or conspiracy; (4) the fact that a defendant has previously been convicted of or adjudged to have been, violating the antitrust laws may warrant indictment for a second offense. . . . The Division feels free to seek

> an indictment in any case where a prospective defendant has knowledge that practices similar to those in which he is engaging have been held to be in violation of the Sherman Act in a prior civil suit against other persons."[15] *Id.*, at 350.

While not dispositive of the question now before us, the recommendations of the Attorney General's Committee and the guidelines promulgated by the Justice Department highlight the same basic concerns which are manifested in our general requirement of *mens rea* in criminal statutes and suggest that these concerns are at least equally salient in the antitrust context.

Close attention to the type of conduct regulated by the Sherman Act buttresses this conclusion. With certain exceptions for conduct regarded as *per se* illegal because of its unquestionably anticompetitive effects, see, *e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. Indeed, the type of conduct charged in the indictment in this case—the exchange of price information among competitors—is illustrative in this regard.[16] The imposition of criminal

15. In 1967, the Antitrust Division refined its guidelines to emphasize that criminal prosecutions should only be brought against willful violations of the law. See The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and Its Impact—An Assessment 110 (1967).

16. The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a *per se* violation of the Sherman Act. See, *e.g.*, *United States v. Citizens & Southern Nat. Bank*, 422 U. S. 86, 113 (1975); *United States v. Container Corp.*, 393 U. S., at 338 (Fortas, J., concurring). A number of factors including most prominently

liability on a corporate official, or for that matter on a corporation directly, for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.[17] See 2 P. Areeda & D. Turner, Antitrust Law 29 (1978); R. Bork, The Antitrust Paradox 78 (1978); Kadish, Some Observations On the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. Chi. L. Rev. 423, 441-442 (1963).

16. (Cont'd.)

the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of this type of interseller communication. See *United States v. Container Corp., supra.* See generally L. Sullivan, Law of Antitrust 265-274 (1977). Exchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not *per se* unlawful have consistently been held to violate the Sherman Act. See *American Column & Lumber Co. v. United States*, 257 U. S. 377 (1921); *United States v. American Linseed Oil Co.*, 262 U. S. 371 (1923); *United States v. Container Corp., supra.*

17. The possibility that those subjected to strict liability will take extraordinary care in their dealings is frequently regarded as one advantage of a rule of strict liability. See J. Hall, General Principles of Criminal Law 344 (2d ed. 1960); W. LaFave & A. Scott, Criminal Law 222-223 (1972). However, where the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged, as in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessarily redound to the public's benefit. The antitrust laws differ in this regard from, for example, laws designed to insure that adulterated food will not be sold to consumers. In the latter situation, excessive caution on the part of producers is entirely consistent with the legislative purpose. See *United States v. Park*, 421 U. S. 658, 671-672 (1975).

Further, the use of criminal sanctions in such circumstances would be difficult to square with the generally accepted functions of the criminal law. See Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob., 401, 422-425 (1958); ALI, Model Penal Code, Comment on § 2.05, p. 140 (Tent. Draft No. 4, 1955). The criminal sanctions would be used, not to punish conscious and calculated wrongdoing at odds with statutory proscriptions, but instead simply to *regulate* business practices regardless of the intent with which they were undertaken. While in certain cases we have imputed a regulatory purpose to Congress in choosing to employ criminal sanctions, see, *e.g., United States v. Balint,* 258 U. S. 250 (1922), the availability of a range of nonpenal alternatives to the criminal sanctions of the Sherman Act negates the imputation of any such purpose to Congress in the instant context.[18] See generally Baker, To Indict or Not To Indict: Prosecutorial Discretion in Sherman Act Enforcement, 63 Cornell L. Rev. 405 (1978).

For these reasons, we conclude that the criminal offenses defined by the Sherman Act should be construed as including intent as an element.[19]

18. Congress has recently increased the criminal penalties for violation of the Sherman Act. Individual violations are now treated as felonies punishable by a fine not to exceed $100,000, or by imprisonment for up to three years, or both. Corporate violators are subject to a $1 million fine. 15 U. S. C. § 1 (1976 ed.). The severity of these sanctions provides further support for our conclusion that the Sherman Act should not be construed as creating strict-liability crimes. Cf. *Morissette v. United States,* 342 U. S. 246, 256 (1952); Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 72 (1933) (strict liability generally inappropriate when offense punishable by imprisonment). Respondents here were not prosecuted under the new penalty provisions since they were indicted prior to the December 21, 1974, effective date for the increased sanctions.

19. An accommodation of the civil and criminal provisions of the Act similar to that which we approve here was suggested by Senator Sherman in response to Senator George's argument during

C

Having concluded that intent is a necessary element of a criminal antitrust violation, the task remaining is to treat the practical aspects of this requirement.[20] As we have noted, the language of the Act provides minimal assistance in determining what standard of intent is appropriate and the sparse legislative history of the criminal provisions is similarly unhelpful. We must therefore turn to more general sources and traditional understandings of the nature of the element of intent in the criminal law. In so doing, we must try to avoid "the variety, disparity and confusion" of judicial definitions of the "requisite but elusive mental element" of criminal offenses. *Morissette v. United States,* 342 U. S., at 252.

The ALI Model Penal Code is one source of guidance upon which the Court has relied to illuminate questions of

19. (Cont'd.)
floor debate that the Act was primarily a penal statute to be construed narrowly in accord with traditional maxims:

"The first section, being a remedial statute, would be construed liberally with a view to promote its object. It defines a civil remedy, and the courts will construe it liberally . . . .

"In providing a remedy the intention of the combination is immaterial. . . .

"The third section is a criminal statute, which would be construed strictly and is difficult to be enforced. In the present state of the law it is impossible to describe, in precise language, the nature and limits of the offense in terms specific enough for an indictment." 21 Cong. Rec. 2456 (1890).

Although the bill being debated by Senators George and Sherman differed in form from the Act as ultimately passed, the colloquy between them indicates that Congress was fully aware of the traditional distinctions between the elements of civil and criminal offenses and apparently did not intend to do away with them in the Act.

20. In a conspiracy, two different types of intent are generally required—the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy. See W. LaFave & A. Scott, Criminal Law 464-465 (1972). Our discussion here focuses only on the second type of intent.

this type. Cf. *Leary v. United States,* 395 U. S. 6, 46 n. 93 (1969); *Turner v. United States,* 396 U. S. 398, 416 n. 29 (1970). Recognizing that "*mens rea* is not a unitary concept," *United States v. Freed,* 401 U. S., at 613 (BRENNAN, J., concurring in judgment), the Code enumerates four possible levels of intent—purpose, knowledge, recklessness, and negligence. In dealing with the kinds of business decisions upon which the antitrust laws focus, the concepts of recklessness and negligence have no place. Our question instead is whether a criminal violation of the antitrust laws requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the "conscious object" of producing such effects or whether it is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow. While the difference between these formulations is a narrow one, see ALI, Model Penal Code, Comment on § 2.02, p. 125 (Tent. Draft No. 4, 1955), we conclude that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws.[21]

Several considerations fortify this conclusion. The element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness.

21. In so holding, we do not mean to suggest that conduct undertaken with the purpose of producing anticompetitive effects would not also support criminal liability, even if such effects did not come to pass. Cf. *United States v. Griffith,* 334 U. S. 100, 105 (1948). We hold only that this elevated standard of intent need not be established in cases where anticompetitive effects have been demonstrated; instead, proof that the defendant's conduct was undertaken with knowledge of its probable consequences will satisfy the Government's burden.

> "[I]t is now generally accepted that a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result." W. LaFave & A. Scott, Criminal Law 196 (1972).

See also G. Williams, Criminal Law: The General Part §§ 16, 18 (2d ed. 1961); Cook, Act, Intention, and Motive in the Criminal Law, 26 Yale L. J. 645, 653-658 (1917); Perkins, A Rationale of *Mens Rea,* 52 Harv. L. Rev. 905, 910-911 (1939). Generally this limited distinction between knowledge and purpose has not been considered important since "there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results." LaFave & Scott, *supra,* at 197. See also ALI, Model Penal Code, Comment on § 2.02, p. 125 (Tent. Draft No. 4, 1955). In either circumstance, the defendants are consciously behaving in a way the law prohibits, and such conduct is a fitting object of criminal punishment. See 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 124 (1970).

Nothing in our analysis of the Sherman Act persuades us that this general understanding of intent should not be applied to criminal antitrust violations such as charged here. The business behavior which is likely to give rise to criminal antitrust charges is conscious behavior normally undertaken only after a full consideration of the desired results and a weighing of the costs, benefits, and risks. A requirement of proof not only of this knowledge of likely

effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome. Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent.

D

When viewed in terms of this standard, the jury instructions on the price-fixing charge cannot be sustained. "A conclusive presumption [of intent] which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense." *Morissette, supra,* at 275. The challenged jury instruction, as we read it, had precisely this effect; the jury was told that the requisite intent followed, *as a matter of law,* from a finding that the exchange of price information had an impact on prices. Although an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted, the jury must remain free to consider additional evidence before accepting or rejecting the inference. Therefore, although it would be correct to instruct the jury that it may infer intent from an effect on prices, ultimately the decision on the issue of intent must be left to the trier of fact alone. The instruction given invaded this factfinding function.[22]

22. Respondents contend that "prior to the trial of this case, no court had ever held that a mere exchange of information which had a stabilizing effect on prices violated the Sherman Act, regardless of the purpose for the exchange." Joint Brief for Respondents 50. Retroactive application of "this judicially expanded definition of the crime" would, the argument continues, contravene the "principles of fair notice embodied in the Due Process Clause." *Ibid.* While we have rejected on other grounds the "effects only" test in the context of criminal proceedings, we do not agree with respondents that

III

Our construction of the Sherman Act to require proof of intent as an element of a criminal antitrust violation leaves unresolved the question upon which the Court of Appeals focused, whether verification of price concessions with competitors for the sole purpose of taking advantage

22. (Cont'd.)
the prior case law dealing with the exchange of price information required proof of a purpose to restrain competition in order to make out a Sherman Act violation.

Certainly our decision in *United States v. Container Corp.*, 393 U. S. 333 (1969), is fairly read as indicating that proof of an anticompetitive effect is a sufficient predicate for liability. In that case, liability followed from proof that "the exchange of price information has had an anticompetitive effect in the industry," *id.*, at 337, and no suggestion was made that proof of a purpose to restrain trade or competition was also required. Thus, at least in the post-*Container* period, which comprises almost the entire time period at issue here, respondents' claimed lack of notice cannot be credited.

Nor are the prior cases treating exchanges of information among competitors more favorable to respondents' position. See *American Column & Lumber Co. v. United States*, 257 U. S., at 400 ("[A]ny concerted action . . . to cause, or which in fact does cause . . . restraint of competition . . . is unlawful"); *United States v. American Linseed Oil Co.*, 262 U. S. 371, 389 (1923) ("[A] necessary tendency . . . to suppress competition . . . [is] unlawful"); *Maple Flooring Mfrs. Assn. v. United States*, 268 U. S. 563, 585 (1925) (purpose to restrain trade or conduct which "had resulted, or would necessarily result, in tending arbitrarily to lessen production or increase prices" sufficient for liability). While in *Cement Mfrs. Protective Assn. v. United States*, 268 U. S. 588 (1925), an exception from Sherman Act liability was recognized for conduct intended to prevent fraud, we do not read that case as repudiating the rule set out in prior cases; instead *Cement* highlighted a narrow limitation on the application of the general rule that either purpose or effect will support liability.

We do not understand respondents to be making the related claim that they relied on the several lower court cases exempting interseller verification for purposes of complying with the Robinson-Patman Act from scrutiny under the Sherman Act, see *infra*, at A48-A49, and thus should not be penalized if those decisions turn out to have been incorrect. Whatever the merits of such an argument, respondents would appear unable to invoke it since the initiation of their verification practices antedated those lower court decisions.

of the § 2(b) meeting-competition defense should be treated as a "controlling circumstance" precluding liability under § 1 of the Sherman Act. We now turn to that question.[23]

A

In *Cement Mfrs. Protective Assn. v. United States,* 268 U. S. 588 (1925), the Court held exempt from Sherman Act § 1 liability an exchange of price information among competitors because the exchange of information was necessary to protect the cement manufacturers from fraudulent behavior by contractors.[24] Over 40 years later, in *United States v. Container Corp.,* 393 U. S., at 335, Mr. Justice Douglas characterized the *Cement* holding in the following terms:

> "While there was present here, as in *Cement Mfrs. Protective Assn. v. United States,* 268 U. S. 588, an exchange of prices to specific customers, there was absent the controlling circumstance, *viz.,* that cement manufacturers, to protect themselves from delivering to contractors more cement than was needed for a

23. This question was not resolved by the prior discussion because a purpose of complying with the Robinson-Patman Act by exchanging price information is not inconsistent with knowledge that such exchanges of information will have the probable effect of fixing or stabilizing prices. Since we hold knowledge of the probable consequences of conduct to be the requisite mental state in a criminal prosecution like the instant one where an effect on prices is also alleged, a defendant's purpose in engaging in the proscribed conduct will not insulate him from liability unless it is deemed of sufficient merit to justify a general exception to the Sherman Act's proscriptions. Cf. *Cement Mfrs. Protective Assn. v. United States,* 268 U. S. 588 (1925).

24. Respondents maintain that their verification practices not only were for the purpose of complying with the Robinson-Patman Act, but also served to protect them from fraud on the part of their customers, and thus fall squarely within the *Cement* exception. The Court of Appeals rejected this claim, 550 F. 2d, at 123 n. 9, and we find no reason to upset this determination.

> specific job and thus receiving a lower price, exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a specific job."

The use of the phrase "controlling circumstance" in *Container Corp.* implied that the exception from Sherman Act liability recognized in *Cement Mfrs.* was not necessarily limited to special circumstances of that case, although the exact scope of the exception remained largely undefined.

Since *Container Corp.,* several courts have read the controlling-circumstance exception as encompassing exchanges of price information when undertaken for the purpose of compliance with § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act. See, *e.g., Belliston v. Texaco, Inc.,* 455 F. 2d 175, 181-182 (CA10 1972); *Wall Products Co. v. National Gypsum Co.,* 326 F. Supp. 295, 312-315 (ND Cal. 1971).[25] The Court of Appeals in the instant case essentially adopted the same tack—albeit with some additional limitations[26]—finding such a step necessary to eliminate a perceived conflict between the Sherman Act's proscriptions regarding the exchange of price information among competitors and the claimed necessity of such exchanges to perfect the § 2(b) defense. The Government challenges that resolution on two grounds: first, that there is no general controlling-circumstance exception to the Sherman Act, and second, that in any event, there is no conflict between the two antitrust statutes which would require the prohibitions of the Sherman Act to be tempered even to the degree man-

25. Although the *Belliston* court did not specifically refer to *Cement's* "controlling circumstance" exception, it adopted the rationale of the *Wall Products* case where that exception was explicitly relied upon to immunize verification from the proscriptions of the Sherman Act.

26. See n. 11, *supra.*

dated by the Court of Appeals' carefully circumscribed holding in this case. We agree generally with the Government as to the proper accommodation of the Sherman and Robinson-Patman Acts, and therefore find it unnecessary to address the more general question going to the existence and proper scope of the so-called controlling-circumstance exception.

B

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13(a) (1976 ed.), embodies a general prohibition of price discrimination between buyers when an injury to competition is the consequence. The primary exception to the § 2(a) bar is the meeting-competition defense which is incorporated as a proviso to the burden-of-proof requirements set out in § 2(b):

> "*Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The role of the § 2(b) proviso in tempering the § 2(a) prohibition of price discrimination was highlighted in *Standard Oil Co. v. FTC*, 340 U. S. 231 (1951). There we recognized the potential tension between the rationales underlying the Sherman and Robinson-Patman Acts and sought to effect a partial accommodation by construing § 2(b) to provide an absolute defense to liability for price discrimination.

> "We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor. For example, if a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors, the seller may well find it essential, as a matter of business survival, to meet that price rather than to lose the customer. . . . There is . . . plain language and established practice which permits a seller, through § 2(b), to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers." 340 U. S., at 249-250.

In *FTC v. A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945), the Court provided the first and still the most complete explanation of the kind of showing which a seller must make in order to satisfy the good-faith requirement of the § 2(b) defense:

> "Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitor's price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. . . . We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *Id.*, at 759-760.

Application of these standards to the facts in *Staley* led to the conclusion that the § 2(b) defense had not been made out. The record revealed that the lower price had been based simply on reports of salesmen, brokers, or purchasers with no efforts having been made by the seller "to investigate or verify" the reports or the character and reliability of the informants. 324 U. S., at 758. Similarly, in *Corn Products Co. v. FTC*, 324 U. S. 726 (1945), decided the same day, the § 2(b) defense was not allowed because "[t]he only evidence said to rebut the *prima facie* case . . . of the price discriminations was given by witnesses who had no personal knowledge of the transactions, and was limited to statements of each witness's assumption or conclusion that the price discriminations were justified by competition." 324 U. S., at 741.

Staley's "investigate or verify" language coupled with *Corn Products'* focus on "personal knowledge of the transactions" have apparently suggested to a number of courts that, at least in certain circumstances, direct verification of discounts between competitors may be necessary to meet the burden-of-proof requirements of the § 2(b) defense. See *Gray v. Shell Oil Co.*, 469 F. 2d 742, 746-747 (CA9 1972); *Belliston v. Texaco, Inc.*, 455 F. 2d, at 181-182; *Webster v. Sinclair Refining Co.*, 338 F. Supp. 248, 251-252 (SD Ala. 1971); *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp., at 312-315; *Di-Wall, Inc. v. Fibreboard Corp.*, 1970 Trade Cases ¶ 73,155 (ND Cal. 1970). In none of these cases were the courts called upon to address directly the question of whether interseller verification was actually *required* to satisfy § 2(b)'s good-faith standard; instead, the issue was presented only obliquely in the form of a defense to the alleged Sherman Act violation. The *Belliston* and *Webster* cases accepted the defense despite the absence of evidence that alternative

means of corroborating the claimed price reduction had been exhausted, while the *Gray* and *Wall Products* courts found the communication between sellers permissible only after other alternatives had been exhausted.[27] The Court of Appeals critically and perceptively analyzed these cases and concluded that only a very narrow exception to Sherman Act liability should be recognized; that exception would cover the relatively few situations where the veracity of the buyer seeking the matching discount was legitimately in doubt, other reasonable means of corroboration were unavailable to the seller, and the interseller communication was for the sole purpose of complying with the Robinson-Patman Act. Despite the court's efforts to circumscribe the scope of the exception it was constrained to recognize, we find its analysis unacceptable.

C

A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the § 2(b) defense. While casual reliance on uncorroborated reports of buyers or sales representatives without further investigation may not, as we noted earlier, be sufficient to make the requisite showing of good faith, nothing in the language of § 2(b) or the gloss on that language in *Staley* and *Corn Products* indicates that direct discussions of price between competitors are required. Nor has any court, so far as we are aware, ever imposed such a requirement.[28] See Rowe, Pricing and the Robinson-Patman Act,

27. The decision in *Di-Wall* is ambiguous on the question of whether alternatives short of verification were exhausted prior to the exchange of price information. 1970 Trade Cases, ¶ 73,155, p. 88,557.

28. In *Viviano Macaroni Co. v. FTC*, 411 F. 2d 255 (CA 3 1969), the § 2(b) defense was not recognized because the seller had relied solely on the report of its customer regarding other com-

41 A. B. A. Antitrust L. J. 98, 100-102 (1971); ABA Section of Antitrust Law, Antitrust Law Developments, 145 n. 241 (1975). On the contrary, the § 2(b) defense has been successfully invoked in the absence of interseller verification on numerous occasions, see, *e.g.*, *International Air Industries, Inc. v. American Excelsior Co.*, 517 F. 2d 714, 725-726 (CA5 1975); *Cadigan v. Texaco, Inc.*, 492 F. 2d 383 (CA9 1974); *Jones v. Borden Co.*, 430 F. 2d 568, 572-574 (CA5 1970); *National Dairy Products Corp. v. FTC*, 395 F. 2d 517, 523 (CA7 1968). And in *Kroger Co. v. FTC*, 438 F. 2d 1372, 1376-1377 (CA6 1971), aff'g *Beatrice Foods Co.*, 76 F. T. C. 719 (1969), the defense was recognized despite the fact that the price concession was ultimately found to have undercut that of the competition and thus technically to have fallen outside the "meet not beat" strictures of the defense. As these cases indicate, and as the Federal Trade Commission observed, it is the concept of good faith which lies at the core of the meeting-competition defense and good faith

> "is a flexible and pragmatic, not technical or doctrinaire, concept. . . . Rigid rules and inflexible absolutes are especially inappropriate in dealing with the § 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application." *Continental Baking Co.*, 63 F. T. C. 2071, 2163 (1963).

28. (Cont'd.)
petitive offers without undertaking any investigation to corroborate the offer or the reliability of the customer. The Court of Appeals in the instant case read *Viviano* as at least suggesting, if not requiring, interseller verification when the veracity of the buyer was in doubt. As we read that case, however, it simply reaffirms the teaching of *Staley*, and does not compel the further conclusion that only interseller verification will satisfy the good-faith requirement, even in the particular circumstances identified by the Court of Appeals. See 550 F. 2d, at 135 (Weis, J., dissenting).

The so-called problem of the untruthful buyer which concerned the Court of Appeals does not in our view call for a different approach to the § 2(b) defense. The good-faith standard remains the benchmark against which the seller's conduct is to be evaluated, and we agree with the Government and the FTC that this standard can be satisfied by efforts falling short of interseller verification in most circumstances where the seller has only vague, generalized doubts about the reliability of its commercial adversary—the buyer.[29] Given the fact-specific nature of the inquiry, it is difficult to predict all the factors the FTC or a court would consider in appraising a seller's good faith in matching a competing offer in these circumstances. Certainly, evidence that a seller had received reports of similar discounts from other customers, cf. *Jones v. Borden Co., supra,* at 572-573; or was threatened with a termination of purchases if the discount were not met, cf. *International Air Industries, Inc. v. American Excelsior Co., supra,* at 726; *Cadigan v. Texaco, Inc., supra,* at 386, would be relevant in this regard. Efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market

29. "Although a seller may take advantage of the meeting competition defense only if it has a commercially reasonable belief that its price concession is necessary to meet an equally low price of a competitor, a seller may acquire this belief, and hence perfect its defense, by doing everything reasonably feasible—short of violating some other statute, such as the Sherman Act—to determine the veracity of a customer's statement that he has been offered a lower price. If, after making reasonable, lawful, inquiries, the seller cannot ascertain that the buyer is lying, the seller is entitled to make the sale. . . . There is no need for a seller to discuss price with his competitors to take advantage of the meeting competition defense." (Citations omitted.) Brief for United States 86-87, and n. 78. See also App. to Pet. for Cert. 97a-99a.

data would also be probative as would the seller's past experience with the particular buyer in question.[30]

There remains the possibility that in a limited number of situations a seller may have substantial reasons to doubt the accuracy of reports of a competing offer and may be unable to corroborate such reports in any of the generally accepted ways. Thus the defense may be rendered unavailable since unanswered questions about the reliability of a buyer's representations may well be inconsistent with a good-faith belief that a competing offer had in fact been made.[31] As an abstract proposition, resort to interseller verification as a means of checking the buyer's reliability seems a possible solution to the seller's plight, but careful examination reveals serious problems with the practice.

Both economic theory and common human experience suggest that interseller verification—if undertaken on an isolated and infrequent basis with no provision for

30. It may also turn out that sustained enforcement of § 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, which imposes liability on buyers for inducing illegal price discounts, will serve to bolster the credibility of buyers' representations and render reliance thereon by sellers a more reasonable and secure predicate for a finding of good faith under § 2(b). See generally Note, Meeting Competition Under the Robinson-Patman Act, 90 Harv. L. Rev. 1476, 1495-1496 (1977). In both *Great Atlantic & Pacific Tea Co. v. FTC*, 557 F. 2d 971 (CA 2 1977), and *Kroger v. FTC*, 438 F. 2d 1372 (CA 6 1971), buyers have been held liable under § 2(f) despite the fact that the sellers were either found not to have violated the Robinson-Patman Act (*Kroger*) or were not charged with such a violation (*A&P*). Certiorari has been granted in *Great Atlantic & Pacific Tea Co.* to consider the permissibility of enforcing the Robinson-Patman Act in this manner. 435 U. S. 922 (1978).

31. We need not and do not decide that in all such circumstances the defense would be unavailable. The case-by-case interpretation and elaboration of the § 2(b) defense is properly left to the other federal courts and the FTC in the context of concrete fact situations. We note also that our conclusions regarding the proper interpretation of § 2(f), see n. 30, *supra*, may well affect subsequent application of the § 2(b) defense.

reciprocity or cooperation—will not serve its putative function of corroborating the representations of unreliable buyers regarding the existence of competing offers. Price concessions by oligopolists generally yield competitive advantages only if secrecy can be maintained; when the terms of the concession are made publicly known, other competitors are likely to follow and any advantage to the initiator is lost in the process. See generally F. Scherer, Industrial Market Structure and Economic Performance 208-209, 449 (1970); P. Areeda, Antitrust Analysis 230-231 (2d ed. 1974); Note, Meeting Competition Under the Robinson-Patman Act, 90 Harv. L. Rev. 1476, 1480-1481 (1977). See also *United States v. Container Corp.*, 393 U. S., at 337. Thus, if one seller offers a price concession for the purpose of winning over one of his competitor's customers, it is unlikely that the same seller will freely inform its competitor of the details of the concession so that it can be promptly matched and diffused. Instead, such a seller would appear to have at least as great an incentive to misrepresent the existence or size of the discount as would the buyer who received it. Thus verification, if undertaken on a one-shot basis for the sole purpose of complying with the § 2(b) defense, does not hold out much promise as a means of shoring up buyers' representations.

The other variety of interseller verification is, like the conduct charged in the instant case, undertaken pursuant to an agreement, either tacit or express, providing for reciprocity among competitors in the exchange of price information. Such an agreement would make little economic sense, in our view, if its sole purpose were to guarantee all participants the opportunity to match the secret price concessions of other participants under § 2(b). For in such circumstances, each seller would know that his

price concession could not be kept from his competitors and no seller participating in the information-exchange arrangement would, therefore, have any incentive for deviating from the prevailing price level in the industry. See *United States v. Container Corp., supra,* at 336-337. Regardless of its putative purpose, the most likely consequence of any agreement to exchange price information would be the stabilization of industry prices. See Scherer, *supra,* at 449; Note, Antitrust Liability for an Exchange of Price Information—What Happened to *Container Corp.,* 63 Va. L. Rev. 639, 666 (1977). Instead of facilitating use of the § 2(b) defense, such an agreement would have the effect of eliminating the very price concessions which provide the main element of competition in oligopolistic industries and the primary occasion for resort to the meeting-competition defense.

Especially in oligopolistic industries such as the gypsum board industry, the exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions. The Department of Justice's 1977 Report on the Robinson-Patman Act focused on the growing use of the Act as a cover for price fixing; former Antitrust Division Assistant Attorney General Kauper discussed the mechanics of the process:

> "And thus you find in some industries relatively extensive exchanges of price information for the purpose, at least the stated purpose, of complying with the Robinson-Patman Act. . . .
>
> "Now, the mere exchange of price information itself may tend to stabilize prices. But I think it is also relatively common that once that exchange process begins, certain understandings go along with it—that we will exchange prices, but it will be understood, for example, you will not undercut my prices.
>
> "And from there it is a rather easy step into a full-fledged price-fixing agreement. I think we have seen that from time to time, and I suspect we will continue to see it as long as there continues to be a need to justify particular price discriminations in the terms of the Robinson-Patman Act." United State Department of Justice, Report on the Robinson-Patman Act 58-61 (1977).

We are left, therefore, on the one hand, with doubts about both the need for and the efficacy of interseller verification as a means of facilitating compliance with § 2(b), and, on the other, with recognition of the tendency for price discussions between competitors to contribute to the stability of oligopolistic prices and open the way for the growth of prohibited anticompetitive activity. To recognize even a limited "controlling circumstance" exception for interseller verification in such circumstances would be to remove from scrutiny under the Sherman Act conduct falling near its core with no assurance, and indeed with serious doubts, that competing antitrust policies would be served thereby. In *Automatic Canteen v. FTC,* 346 U. S. 61, 74 (1953), the Court suggested that as a general rule the Robinson-Patman Act should be construed so as to insure its coherence with "the broader antitrust policies that have been laid down by Congress"; that observation buttresses our conclusion that exchanges of price information—even when putatively for purposes of Robinson-Patman Act compliance—must remain subject to close scrutiny under the Sherman Act.[32]

32. That the § 2(b) defense may not be available in every situation where a competing offer has in fact been made is not, in our view, a meaningful objection to our holding. The good-faith

IV

One judge of the Court of Appeals was of the view that reversal was required not only because of infirmities in the antitrust instruction, but also because the trial judge had "encroach[ed] on [the] jury['s] authority" and had foreclosed "a possible 'no verdict' outcome." 550 F. 2d, at 134 (Adams, J., concurring). Our own review of the record and the circumstances surrounding the deliberations of the jury, and in particular the *ex parte* communications between the judge and jury foreman, leads us to the same conclusion.

After hearing a mass of testimony for nearly five months, the jurors were sequestered when deliberations commenced. On the second and third days of deliberations, supplemental instructions were given in response to jury questions; on the fourth day, the hours of deliberations were shortened because of reported nervous tension among the jurors; on the fifth day, the judge *sua sponte* delivered what amounted to a modified *Allen* charge [33] in the course of providing further answers to questions from

32. (Cont'd.)
requirement of the § 2(b) defense implicitly suggests a somewhat imperfect matching between competing offers actually made and those allowed to be met. Unless this requirement is to be abandoned, it seems clear that inadequate information will in a limited number of cases, deny the defense to some who, if all the facts had been known, would have been entitled to invoke it. For reasons already discussed, interseller verification does not provide a satisfactory solution to this seemingly inevitable problem of inadequate information. Moreover, § 2(b) affords only a defense to liability and not an affirmative right under the Act. While sellers are, of course, entitled to take advantage of the defense when they can satisfy its requirements, efforts to increase its availability at the expense of broader, affirmative antitrust policies must be rejected.

33. *Allen v. United States*, 164 U. S. 492 (1896). An injunction to the jury "to deliberate with a view toward reaching an agreement if you can, without violence, to individual judgment," was also included in the judge's original instruction prior to the commencement of deliberations.

the jury; and on the sixth day, the modified *Allen* charge was repeated, this time in response to a note from the jury that it was unable to reach a verdict. Against this background of internal pressures and apparent disagreements and confusion among the jurors, the jury foreman, on the morning of the seventh day of deliberations, requested a meeting with the judge "to discuss the condition of the Jury and further guidance." The District Judge suggested that he meet alone with the jury foreman and counsel acquiesced. The transcript of the meeting, which was initially impounded but released for purposes of the appeal, contained several references by the foreman to the jury's deadlock, as well as an exchange suggesting the strong likelihood that the foreman carried away from the meeting the impression that the judge wanted a verdict "one way or the other." The judge's report to counsel summarizing the discussion made no reference to either of these matters.[34]

We find this sequence of events disturbing for a number of reasons. Any *ex parte* meeting or communication between the judge and the foreman of a deliberating jury is pregnant with possibilities for error. This record amply demonstrates that even an experienced trial judge cannot be certain to avoid all the pitfalls inherent in such an enterprise. First, it is difficult to contain, much less to anticipate, the direction the conversation will take at such a meeting. Unexpected questions or comments can generate unintended and misleading impressions of the judge's subjective personal views which have no place in his instruction to the jury—all the more so when counsel are not present to challenge the statements. Second, any occasion which leads to communication with the whole jury panel through one juror inevitably risks innocent mis-

34. See n. 9, *supra*.

statements of the law and misinterpretations despite the undisputed good faith of the participants. Here, there developed a set of circumstances in which it can fairly be assumed that the foreman undertook to restate to his fellow jurors what he understood the judge to have implied regarding the resolution of the case in a definite verdict "one way or the other." There is, of course, no way to determine precisely what the foreman said when he returned to the jury room.

Finally, the absence of counsel from the meeting and the unavailability of a transcript or full report of the meeting aggravate the problems of having one juror serve as a conduit for communicating instructions to the whole panel. While all counsel acquiesced to the judge's *ex parte* conference with the jury foreman, they did so on the express understanding that the judge merely intended—as no doubt at the time he did—to receive from the foreman a report on the state of affairs in the jury room and the prospects for a verdict. Certainly none of the parties waived the right to a full and accurate report of what transpired at the meeting nor did they agree that the judge was to repeat the instructions as to his understandable reluctance to accept the jury's inability to reach a verdict. Because neither counsel received a full report from the judge, they were not aware of the scope of the conversation between the foreman and the judge, of the judge's statement that the jury should continue to deliberate in order to reach a verdict, or of the real risk that the foreman's impression was that a verdict "one way or the other" was required. Counsel were thus denied any opportunity to clear up the confusion regarding the judge's direction to the foreman, which could readily have been accomplished by requesting that the whole jury be called into the courtroom for a clarifying instruction. See *Rogers v. United States*, 422 U. S. 35, 38 (1975); *Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 81 (1919). Thus, it is not simply the action of the judge in having the private meeting with the jury foreman, standing alone—undesirable as that procedure is—which constitutes the error; rather, it is the fact that the *ex parte* discussion was inadvertently allowed to drift into what amounted to a supplemental instruction to the foreman relating to the jury's obligation to return a verdict, coupled with the fact that counsel were denied any chance to correct whatever mistaken impression the foreman might have taken from this conversation, that we find most troubling.

While it is, of course, impossible to gauge what part the disputed meeting played in the jury's action of returning a verdict the following morning, this swift resolution of the issues in the face of positive prior indications of hopeless deadlock, at the very least, gives rise to serious questions in this regard. Cf. *Rogers v. United States*, *supra*, at 40-41. In *Jenkins v. United States*, 380 U. S. 445 (1965), we held an instruction directing the jury that it *had to* reach a verdict was reversible error; the logic of *Jenkins* cannot be said inapposite here given the peculiar circumstances in which discussions between the judge and the foreman took place.

We are persuaded that the Court of Appeals would have been justified in reversing the convictions solely because of the risk that the foreman believed the court was insisting on a dispositive verdict; a belief which we must assume was promptly conveyed to the jurors. The unintended direction of the colloquy between the judge and the jury foreman illustrates the hazards of *ex parte* communications with a deliberating jury or any of its members.

V

Respondents also challenged in the Court of Appeals the jury instructions regarding participation in the con-

spiracy and withdrawal therefrom; one judge on the panel concluded that these instructions were infirm. We agree with the Government that the charge concerning participation in the conspiracy, while perhaps not as clear as it might have been, was sufficient. The jury was informed repeatedly that only a single conspiracy was alleged and that liability could only be predicated on the knowing involvement of each defendant, considered individually, in the conspiracy charged. As given,[35] the instruction was substantially in accord with those generally given in similar antitrust cases. See ABA Antitrust Section, Jury Instructions in Criminal Antitrust Cases 1964-1976, chs. 10, 28 (1978); 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions §§ 55.09, 55.17 (3d ed., 1977). And in any event, the disputed instruction differed in only minor and immaterial respects from the instruction requested by respondents.[36]

We have more difficulty with the instruction on withdrawal from conspiracy. The jury was charged in the following terms:

> "In order to find that a defendant abandoned or withdrew from a conspiracy prior to December 27, 1968, you must find, from the evidence, that he or it

35. See n. 5, *supra*.

36. The requested charge was as follows:

"Because the gist of the offense charged is a continuing agreement to raise, fix, maintain and stabilize prices of gypsum products, it is essential for you to determine what kind of agreement or understanding, if any, existed as to each defendant. Each defendant is chargeable with the acts of his or its fellow defendants and alleged co-conspirators only if the acts are done in furtherance of the joint venture as he or it understood it. No defendant is to be held responsible for what some of the alleged conspirators, unknown to the rest, do beyond the reasonable intendment of the common agreement or understanding, if any, to which you may find him or it a party." 550 F. 2d, at 128-129, n. 13 (emphasis omitted).

> took some affirmative action to disavow or defeat its purpose. Mere inaction would not be enough to demonstrate abandonment. To withdraw, a defendant *either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials.*
>
> "Thus, once a defendant is shown to have joined a conspiracy, in order for you to find he abandoned the conspiracy, the evidence must show that the defendant took some definite, decisive step, indicating a complete disassociation from the unlawful enterprise." (Emphasis added).

Respondents had requested a more expansive instruction which would have specifically allowed the jury to consider a "[r]esumption of competitive behavior, such as intensified price cutting or price wars," as affirmative action showing a withdrawal from the price-fixing enterprise. While the judge allowed this theory to be argued to the jury, he declined to include it in his instructions. The Government now seeks to defend the charge as given on the ground that the first sentence was sufficiently broad to satisfy respondents' concerns, and the third sentence, to which respondents principally object, did not in any meaningful way detract from the generality of the first.

We cannot agree. The charge, fairly read, limited the jury's consideration to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy.[37] Nothing that we have been able to find in the case law suggests, much less commands, that

37. In this case the obligation to notify "each other member" of the charged conspiracy would be a manageable task; in other situations all "other" members might not be readily identifiable.

such confining blinders be placed on the jury's freedom to consider evidence regarding the continuing participation of alleged conspirators in the charged conspiracy. Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment. See, *e.g.*, *Hyde v. United States*, 225 U. S. 347, 369 (1912); *United States v. Borelli*, 336 F. 2d 376, 385 (CA2 1964). See also Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 958 (1959). We conclude that the unnecessarily confining nature of the instruction, standing alone, constituted reversible error.[38] If a new trial takes place, an instruction correcting this error and giving the jury broader compass on the question of withdrawal must be given.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE STEWART joins all but Part IV of this opinion.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT

[Present: The foreman of the jury and the Court.]

The COURT. What is your problem, sir?

Mr. RUSSELL. I have two problems. And first of all, if I refer to a juror with a sexual gender, I would like it struck, because I would like to say juror.

38. The instruction on withdrawal and proper evidence thereof may have been of particular importance here because respondents vigorously argued throughout the trial that competition within the industry resumed before December 27, 1968, the critical date for purposes of the applicable five-year statute of limitations.

The COURT. In other words, if he says he or she, make it neutral.

Mr. RUSSELL. The two problems are health and the status of the count.

The COURT. You can't tell me that now.

Mr. RUSSELL. I am not going to tell you what the status is in no way. In fact, I can't tell you, because I can't remember.

The COURT. All right.

Mr. RUSSELL. But first of all, I would like to thank you for that 6:30, because I don't think you would have a jury left. I am not a doctor, but these people are getting very distraught. It is not that they go into a depression and stay there; they go into a depression and they're coming out high. Now I would say at least eight of the jurors are taking some kind of pill. Some of the pills have been even issued by the doctor downstairs. I am not a doctor and I can't judge these things, but I have seen one of [3] these jurors at one time I thought she was going to jump out the window. And I, just for my own sake, without telling you this, I cannot take the responsibility that this could happen. I know this is part of Mr. Keene's job, but like I say, they go high and low, and sometimes by the time I get to Mr. Keene and get him down there, they are perfectly normal again.

In fact, one of the instances was when I saw this one girl—

The COURT. May I ask this: If we discharged—we can excuse one juror for health reasons. Is there any juror we could excuse that would help the situation? If it is more than that, there is no point.

Mr. RUSSELL. I think there is more than that, Judge. I am not a doctor, so I can't say. I'm not even sure these

are true sicknesses. They seem—I mean, with the high and low, they seem induced, but when a person thinks they are sick, they're generally sick.

The Court. It is just as bad, if they think they are.

Mr. Russell. As I say, I am not a doctor. I don't like to be a judge, but I think for my own sake, my feelings, it is my responsibility as foreman to tell you these things. I do not want to be responsible for anybody's health.

The Court. I don't, either.
[4] You recall, though, that before—when I had two alternate jurors, I asked all the jurors if there was anybody who was not physically able to go ahead and everybody wanted to do it.

Mr. Russell. I realize that. I think every juror out there wants to do their duty.

The Court. See, we have tried this case now for four months.

Mr. Russell. This is part of it, I will grant you, but it is not the whole part of it. There is some personality conflicts on the jury that have led to certain situations and I think we have overcome those.

The Court. If we continue to deliberate from 9 to 6:30, with a lunch hour, for a while longer—

Mr. Russell. What I want to tell you next is—and that is, again, my opinion—and you can tell me I am wrong—and I have to look at it in a different way. We have taken enough ballots now, and we have had enough discussions, and the way it is divided is not going to be settled by any document, any remembrance of testimony.

It is based on a belief and even if they—even if they would sign a document today, and you would ask me to get up in the jury box and swear I think this is a true and just verdict, I would have to say no, because I believe in the twelve or multiple system of a jury; that if we are to decide beyond a [5] reasonable doubt, when you get twelve, or whatever the number has to be—

The Court. That is what you have to decide.

Mr. Russell. ————it proves it beyond a shadow of a doubt.

The Court. Not beyond a shadow of a doubt.

Mr. Russell. I know. Each individual proves it to himself, but for a man to be convicted guilty, or the company, we do it beyond a reasonable doubt, but if you have twelve, you know it is beyond a shadow of a doubt and you cannot have any conscience over it as far as a juror or anything else. That is the way I feel, Judge.

The Court. What are you suggesting?

Mr. Russell. I am asking you what I should do. I am to the point———

The Court. I would like this jury to deliberate longer. I say that because, as I say, we have tried it for a considerable period of time.

Mr. Russell. Everybody realizes that and I do.

The Court. We have individual people here who are concerned and the jury has now deliberated—they deliberated three full days, Wednesday, Thursday and [6] Friday. They deliberated a half a day on Saturday and a half day on Sunday. They are not deliberating a full day, because jurors usually deliberate until eleven or ten at night.

Mr. Russell. We know that and we want to thank you.

The Court. You have not deliberated that long yet.

Mr. Russell. I know that is the way you would like it, but what I am trying to tell you is I don't think deliberation is going to change it. It is not a matter of time anymore.

The Court. Are you telling me this jury is hopelessly deadlocked and will never reach a verdict?

Mr. Russell. In my opinion, it is. I have to rely on that. I have no experience in this kind of thing. I don't know what people go through in a jury. This is the first time I have ever served on one and it is a new experience and I will never forget it. But it is a terrible responsibility and what I said, if it was a matter of finding a document or finding a part of a testimony that would convince somebody, I would say sure, and good.

The Court. All right.

For the time being continue your deliberations. I will take into consideration what you have told me.

[7] Mr. Russell. As I said, the health problem is something that I think has to be looked at. I don't know how you are going to judge this or whether you call Mr. Keene and ask him or the Marshal's opinion, but I think something ought to be done.

The Court. All right. I will take it into consideration. I have to talk to counsel.

Mr. Russell. I appreciate that. I didn't expect a decision, but I would like some kind of guidance.

The Court. I would like to ask the jurors to continue their deliberations and I will take into consideration what you have told me. That is all I can say.

Mr. Russell. I appreciate it. It is a situation I don't know how to help you get what you are after.

The Court. Oh, I am not after anything.

Mr. Russell. You are after a verdict one way or the other.

The Court. Which way it goes doesn't make any difference to me.

Mr. Russell. They keep saying, "If you will tell him what the situation is, he might accept it."

I said, "He doesn't want to know. He told me that he doesn't want to know what the decision is."

[8] The Court. No, I don't want to know that. It would not be proper for me to know.

Mr. Russell. You may imply something from what I said.

The Court. I can imply something from just watching, but I don't want you to tell me. That would be a breach of your duty.

Mr. Russell. I have told you as best I can.

The Court. Thank you. You tell them to keep deliberating and see if they can come to a verdict.

[At 12:04 p. m. the jury foreman returned to the deliberation room.]

Certified true and correct transcript.

/s/ Marion C. Wike
Marion C. Wike

Official Reporter

[App. 1837-1840]

Mr. Justice Powell, concurring in part.

I join the judgment and Parts I, II, and V of the Court's opinion.[1] I also join so much of Part III as holds that a seller's intention to establish a meeting-competition defense under § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, to a charge of price discrimination under § 2(a) is not in itself a "controlling circumstance" excusing liability under § 1 of the Sherman Act for otherwise lawful direct price-verification practices.

I do not join those portions of Part III, however, that might be read as suggesting that there are cases where the § 2(b) defense is unavailable even though a seller made every reasonable, lawful effort to corroborate his buyer's report that a competitor had offered a lower price before reducing his own price to that buyer. See *e.g., ante,* at A52-A53, A55-A56 n. 32.[2] In my view, a proper accommodation between the policies of the Robinson-Patman Act and the Sherman Act would result in recognition of the § 2(b) defense in such cases. Otherwise, sellers sometimes would face the unenviable choice of reducing prices to one buyer and risking Robinson-Patman Act liability, refusing to do so and losing the sale, or reducing prices to all buyers.

A prudent businessman faced with this choice often would forgo the price reduction altogether. This reaction would disserve the procompetitive policy of the Sherman Act without advancing materially the antidiscrimination policy of the Robinson-Patman Act. The Court already has made clear that the Robinson-Patman Act "does not require the seller to justify price discriminations by showing that in fact they met a competitive price." *FTC v.*

1. Because the issue discussed in Part IV of the Court's opinion is unlikely to arise at any retrial, I find it unnecessary to express a view as to it.

2. I do not understand the Court to take a firm position on this issue. See *ante,* at A52 n. 31.

A. E. Staley Mfg. Co., 324 U. S. 746, 759 (1945). Today the Court confirms that "it is the concept of good faith which lies at the core of the meeting-competition defense and good faith 'is a flexible and pragmatic, not technical or doctrinaire, concept.'" *Ante,* at A50, quoting *Continental Baking Co.,* 63 F. T. C. 2071, 2163 (1963). A seller who has attempted to verify his buyer's report by every reasonable, lawful means before reducing his price to meet a competitor's price, in my view, has met the test of "good faith." In such a case, if the buyer's report proves to have been untruthful, it is the buyer alone, not the seller, who has acted in bad faith.

Mr. Justice Rehnquist concurring in part and dissenting in part.

I concur in Part I and in the first portion of Part V of the Court's opinion approving the jury instruction on participation in the conspiracy. I dissent from the remaining portions of the opinion and set forth as briefly as possible my reasons for doing so.

Part II of the Court's opinion uses as its point of departure jury instructions on price fixing which the Court correctly characterizes as "not without ambiguity." *Ante,* at A29. However, these jury instructions are but a starting point for the discourse in Part II of the Court's opinion dealing with the element of intent in a criminal case, a discourse which I believe goes beyond any reasoning necessary to dispose of the contentions with respect to that point in this case.

I do not find it necessary to decide the intent which Congress required as a prerequisite for criminal liability under the Sherman Act, because I believe that the instructions given by the District Court, when considered as a whole and in connection with the objections made to them, are sufficiently close to respondents' tendered in-

structions so as to afford respondents no basis upon which to challenge the verdict. The jury instructions in this case take up some 40 pages of the record and are both detailed and complex. The judge instructed the jury as to both respondents' contention that they exchanged price information solely to comply with the Robinson-Patman Act, and the Government's contention that

> "the Defendants' purpose was not merely to establish their good faith under the Robinson-Patman Act, but that *they exchanged competitive information for the purpose of raising, fixing, maintaining, and stabilizing prices.*
>
> "It will be up to you, members of the jury, to resolve these issues.
>
> "First, you must determine whether there was an agreement, either implied or express, to engage in the practice of price checking or verification. . . .
>
> * * *
>
> "Secondly, you must determine *whether the purpose* for the exchange of competitive information between the Defendants and their alleged co-conspirators was to insure a good faith meeting of competition, as a defense to the Robinson-Patman Act.
>
> "If you decide that, if you decide that this was *merely done in a good faith effort to comply with the Robinson-Patman Act, then you could not consider verification, standing alone, as establishing an agreement to fix, raise, maintain, and stabilize prices as charged.*
>
> "However, if you decide that the effect of these changes was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these changes as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain, and stabilize list prices." App. 1720-1721 (emphasis added).

Read in conjunction with the above, the portions of the instructions quoted by the Court, *ante*, at A24, are not reversible error. The jury was instructed that it must find a purpose "to raise, fix, maintain, and stabilize list prices" and that this purpose could be presumed from the effect of respondent's agreement. Respondents' proposed instruction * does not significantly differ from that given by the District Court. I might add that in my view it would take plainly erroneous instructions, the error of which were both quite precisely and reasonably pointed out to the District Court, to warrant reversal of a judgment entered upon a jury's verdict following five months of trial.

The portions of Part II which I find most troubling are not those which expressly address the congressionally prescribed requirement of intent for criminal liability under the Sherman Act, but those which discourse at length upon the role of intent in the imposition of criminal liability in general, particularly those which might be taken to import any special constitutional difficulty if criminal liability is imposed without fault. While the Court emphasizes that its result is not constitutionally required, *ante*, at A33, the

* "There has been evidence in this case of a defendant's contacting a competitor to verify the existence or nonexistence of a reported lower price or other competitive condition in the market place. This practice has been referred to as 'verification.' There is evidence that verification was engaged in by defendants for the purpose of compliance with the Robinson-Patman Act, one of the federal antitrust laws. I charge you as a matter of law that no finding of guilt may be made in this case based on verification engaged in for the purpose of compliance with the Robinson-Patman Act. Further, to consider verification as any evidence whatsoever of an alleged price-fixing conspiracy you must first determine beyond a reasonable doubt that the purpose of verification was *not* compliance with the Robinson-Patman Act." App. 1857.

Court's broad policy statements may be misread by the lower courts. I also feel bound to say that while I am willing to respectfully defer to the views of the distinguished authors of the American Law Institute's Model Penal Code, and to the authors of law review articles and treatises such as those sprinkled throughout the text of Part II of the Court's opinion, I have serious reservations about the undiscriminating emphasis and weight which the Court appears to give them in this case.

For similar reasons, I do not believe that it is necessary in this case to address the interrelationship of the Robinson-Patman Act's meeting-competition defense and the Sherman Act, and I cheerfully refrain from that task. The jury was clearly instructed that if price information was exchanged "in a good faith effort to comply with the Robinson-Patman Act," this exchange by itself would not make out a violation of the Sherman Act. I believe that the communications between the judge and the jury foreman described in Part IV of the Court's opinion, having been consented to by all parties to the case, would not justify a reversal of the verdict of the jury. I agree with that portion of Part V of the Court's opinion which approves the charge given the jury concerning participation in the conspiracy, but disagree with that portion of Part V which seems to approve a more expansive instruction with respect to withdrawal from the conspiracy. In my opinion, neither of these instructions of the District Court was sufficient, either separately or together, to warrant reversal of the jury's verdict of guilty.

I therefore conclude that the judgment of the Court of Appeals should be reversed, and the judgment of the District Court based upon the jury's verdict should be reinstated.

Mr. Justice Stevens, concurring in part and dissenting in part.

There are three reasons why I am unable to subscribe to the bifurcated construction of § 1 of the Sherman Act which the Court adopts in Part II of its opinion.

In 1955 I subscribed to the view that criminal enforcement of the Sherman Act is inappropriate unless the defendants have deliberately violated the law.[1] I adhere to that view today. But since 1890 when the Sherman Act was enacted, the statute has had the same substantive reach in criminal and civil cases. No matter how wise the new rule that the Court adopts today may be, I believe it is an amendment only Congress may enact.

If I were fashioning a new test of criminal liability, I would require proof of a specific purpose to violate the law rather than mere knowledge that the defendants' agreement has had an adverse effect on the market.[2] Under the lesser standard adopted by the Court, I believe Mr. Justice Rehnquist is quite right in viewing the error in the trial judge's instructions as harmless. *Ante*, at A69-A72. There is, of course, a theoretical possibility that defendants could engage in a practice of exchanging current price information that was sufficiently prevalent to have had a marketwide impact that they did not know about, but as a practical matter that possibility is surely remote.

Finally, I am afraid that the new civil-criminal dichotomy may work mischief in the civil enforcement of the prohibition against tampering with prices in a free market.

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1. Report of the Attorney General's National Committee to Study the Antitrust Laws 349-351 (1955).

2. The distinction between the two standards is explained *ante*, at A39-A40. The Report of the Attorney General's Committee recommended that "criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade." Report, *supra*, n. 1, at 349.

Conclusive presumptions play a central role in the enforcement, both civil and criminal, of the Sherman Act. Thus, an agreement to charge the same price,[3] or to adopt a common purchasing policy that determines the market price[4] is unreasonable, and therefore unlawful, without any proof of the purpose or the actual effect of the agreement. The law presumes that those who entered the price-fixing agreement knew that forbidden effects would follow, and it also presumes, conclusively, that those effects will follow. In a criminal prosecution for price fixing in violation of the Sherman Act it is, therefore, irrelevant whether the prices fixed were reasonable or whether the defendant's intentions were good.[5] See *United States v. Trenton Potteries Co.*, 273 U. S. 392. As Mr. Justice Stone explained for the Court in that case, "the Sherman law is not only a prohibition against the infliction of a particular type of public injury. It 'is a limitation of rights, . . . which may be pushed to evil consequences and therefore restrained.'" *Id.*, at 398 (citation omitted).

To be sure, cases such as *Trenton Potteries* involved conduct that was determined to be illegal on its face, while in this case the trial court appraised respondents' agreement under "rule of reason" analysis.[6] But properly understood, rule-of-reason analysis is not distinct from "*per se*" analysis. On the contrary, agreements that are illegal *per se* are merely a species within the broad category of agreements that unreasonably restrain trade; less proof is required to establish their illegality, but they nonetheless violate the basic rule of reason.[7]

3. *United States v. Trenton Potteries Co.*, 273 U. S. 392.

4. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150.

5. In fact, early in the development of criminal enforcement of the Sherman Act, this Court stated:

"[T]he conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result." *United States v. Patten*, 226 U. S. 525, 543.

6. An argument can be made that an agreement among the major producers in the market to exchange current price information should be considered illegal on its face. As the Court points out, "[e]xchanges of current price information . . . have the greatest potential for generating anticompetitive effects and . . . have consistently been held to violate the Sherman Act." *Ante*, at A36-A37 n. 16.

As applied to an agreement among major producers to exchange current price information, the rule of reason requires an element in addition to proof of the agreement itself—either an actual market effect or an express purpose to affect market price—but once that element is shown, any additional showing of intent is unnecessary. See *United States v. Container Corp.*, 393 U. S. 333. The rule is premised on the assumption that if the practice of exchanging current price information is sufficiently prevalent to affect the market price, then there is an extremely high probablity that the sales representatives of these companies had actual knowledge of that fact. Given the language of § 1, that premise is as valid in the context of a criminal prosecution as it is in the context of a treble-damages civil action.

Accordingly, although I agree with much of the abstract discussion in Part II of the Court's opinion, I concur only in Parts I, III, IV, and V, and in the judgment.

7. Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, 57 Nw. L. Rev. 137, 139 (1962).

APPENDIX E.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

UNITED STATES GYPSUM COMPANY,
Appellant in 75-1836, et al.

Appeal of NATIONAL GYPSUM COMPANY, in 75-1837.

Appeal of GEORGIA-PACIFIC CORPORATION, in 75-1838.

Appeal of THE CELOTEX CORPORATION, in 75-1839.

Appeal of COLON BROWN, in 75-1840.

Appeal of J. P. NICELY, in 75-1841.

Appeal of ANDREW J. WATT, in 75-1842.

Nos. 75-1836 to 75-1842.

Argued June 21, 1976.

Decided Jan. 12, 1977.

As Amended Jan. 20, 1977.

John C. Fricano, Rodney O. Thorson, George Edelstein, L. John Schmoll, Jr., Michael A. Rosen, Peter A. Mullin, Dept. of Justice—Antitrust Div., Washington, D. C., for appellee.

Robert C. Keck, James G. Hiering, Valentine A. Weber, Jr., Keck, Cushman, Mahin & Cate, Chicago, Ill., Benjamin M. Quigg, Jr., Morgan, Lewis & Bockius, Philadelphia, Pa., for U. S. Gypsum Co.

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Cloyd R. Mellott, William B. Mallin, Barton Z. Cowan, J. Gary Kosinski, D. Richard Funk, Eckert, Seamans, Cherin & Mellott, Pittsburgh, Pa., for Georgia-Pacific Corp.

W. Donald McSweeney, William A. Montgomery, Joseph R. Lundy, Schiff, Hardin & Waite, Chicago, Ill., for The Celotex Corp.

Paul C. Warnke, Thomas Richard Spradlin, Clifford, Warnke, Glass, McIlwain & Finney, Washington, D. C., for Colon Brown and J. P. Nicely.

Fred H. Bartlit, Jr., Thomas A. Gottschalk, Jeffrey S. Davidson, Kirkland & Ellis, Chicago, Ill., for Andrew J. Watt.

Before ADAMS, HUNTER and WEIS, *Circuit Judges.*

JAMES HUNTER, III, *Circuit Judge:*

This is an appeal by United States Gypsum Company (USG), National Gypsum Company (National), Georgia-Pacific Corporation (G-P), The Celotex Corporation (Celotex), Andrew J. Watt, Colon Brown, and J. P. Nicely, defendants in a complex case under Section 1 of the Sherman Act, 15 U. S. C. § 1.[1] Each corporate defendant

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1. Section 1 reads in pertinent part as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

manufactures, sells, and distributes gypsum board products, which are widely used in the construction industry. Watt is Executive Vice President of USG. Brown is Chairman of National's Board of Directors, and Nicely recently retired as Vice President for Sales in National's Building Products Division.[2] For the reasons that follow, we reverse and remand.

I.

Gypsum board is produced in standard sizes, of which 4′ × 8′ × ½″ is the most common. It consists of a layer of gypsum rock sandwiched between sheets of heavy paper. Since World War II, it has replaced gypsum plaster as the principal component of interior walls in all types of buildings.

The gypsum board industry is highly concentrated. Between 1960 and 1973, the number of producers varied from nine to fourteen, and the eight major producers accounted for more than ninety-four percent of national sales. The corporate appellants together account for more than seventy-five percent of national sales. There are no significant differences in quality or appearance among the standard types of board produced by the various manufacturers. Demand is determined by activity in the construction industry and is inelastic with respect to price. Because of the homogeneity of the different brands, a buyer's decision to purchase one particular brand is generally

2. Each of the corporate defendants received the maximum $50,000 fine. Brown also drew a $50,000 fine, as well as a six-month suspended sentence and three years probation. Watt received a $10,000 fine, a six-month suspended sentence, and one year probation. Nicely was fined $1,000 and received a six-month suspended sentence and one year probation. After the indictment in this case was handed up, § 1 was amended to provide for a maximum fine of $1,000,000 for corporate defendants and $100,000 for other persons. 15 U. S. C. § 1 (1970), *as amended* (Supp. IV, 1974).

based on price. Price discounts and changes in credit terms are the most important form of competition in the industry.

Between 1965 and 1970, the Department of Justice conducted several investigations of possible antitrust violations in the gypsum board industry. In 1971, a grand jury inquiry commenced, and another twenty-eight months of investigation ensued. On December 27, 1973, an indictment was returned in the Western District of Pennsylvania. It named the appellants and nine other defendants[3] as participants in a conspiracy, starting before 1960 and lasting to the date of indictment, (1) to raise, fix, maintain, and stabilize the price of gypsum board; (2) to fix, maintain, and stabilize the terms and conditions of sale of gypsum board; and (3) to adopt and maintain uniform methods of packaging and handling, all in violation of Section 1 of the Sherman Act.

All defendants moved for dismissal, alleging that unreasonable pre-indictment delay had worked a denial of their rights to due process of law as guaranteed by the fifth amendment to the United States Constitution. This motion was denied after a five-day evidentiary hearing. Subsequently, the nine defendants who are not parties to this appeal were convicted and sentenced on pleas of nolo contendere.[4] Trial of the remaining defendants began on

3. The other defendants were Graham J. Morgan, chairman of the board of USG; William H. Hunt, president of G-P; William D. Herbert, president of Celotex; Kaiser Gypsum Company; Claude E. Harper and Robert A. Costa, Kaiser's president and vice-president, respectively; The Flintkote Company; and George J. Pecaro and James D. Moran, Flintkote's chairman of the board and president, respectively. The indictment named as co-conspirators, but not as defendants, Johns-Manville Corporation; Fibreboard Corporation; and the Gypsum Association, the industry trade association.

4. Kaiser and Flintkote each received the maximum $50,000 fine. Morgan (USG) received a $40,000 fine, a six-month suspended sentence and two years probation. Hunt (G-P) and Harper

March 3, 1975, and the jury brought in its verdict on July 15, 1975. The Government called thirty-five witnesses, appellants thirty. The trial record consists of more than 15,000 pages of transcript and some 6500 exhibits.

II.

At the outset, we are met with appellants' contention that the due process clause of the fifth amendment requires dismissal of the indictment. They allege that the Government unduly delayed bringing the indictment and that this delay impaired appellants' ability to present a defense. We affirm the district court's refusal to dismiss the indictment.

In *United States v. Marion*, 404 U. S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971), the Supreme Court indicated that "the Due Process Clause of the Fifth Amendment would require dismissal of the Indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellee's rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *Id.* at 324, 92 S. Ct. 465. Because no prejudice was shown, however, the *Marion* Court upheld the indictment. Thus, there was no holding as to the specific requirements of a successful showing of prejudicial delay, and it was unclear whether both prejudice and governmental intent are necessary or whether prejudice alone would suffice. *See, e.g., United States v. Barket,* 530 F. 2d 189, 194-195 & n. 9 (8th Cir.), *cert. denied,* 429 U. S. 917, 97 S. Ct. 308, 50 L. Ed. 2d 282 (1976). We need not resolve this question, because we find neither undue delay nor substantial prejudice.

4. (Cont'd.)
(Kaiser) each drew a $40,000 fine, a six-month suspended sentence, and eighteen months probation. Herbert (Celotex), Costa (Kaiser), Pecaro (Flintkote), and Moran (Flintkote) each received a $20,000 fine, a thirty-day suspended sentence, and one year probation.

We consider first the alleged undue delay. Appellants' major argument is that the Government deliberately postponed empaneling the grand jury to await the outcome of a civil case, *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N. D. Cal. 1971), involving charges of the same conspiracy. After a lengthy evidentiary hearing, however, the court below found that the interval between the initial investigations of the gypsum board industry and the bringing of the indictment was not unreasonable in light of the extraordinary magnitude of the case and the frequent dead ends encountered by the investigators. *United States v. United States Gypsum Co.*, 383 F. Supp. 462, 464-70 (W. D. Pa. 1974). As the district court noted, *id.* at 467, any delay in empaneling the grand jury resulted from the Government's reluctance to frame criminal charges against appellants before learning whether plaintiffs in a civil action could carry their burden of proof. The district court's findings are not clearly erroneous.

USG separately argues that the Government is collaterally estopped to deny intentional delay, relying on *United States v. United States Gypsum Co.*, Civil No. 71-2467 (N. D. Cal., filed Dec. 30, 1971). In that suit against six gypsum companies, the Government sought to recover damages accrued before the start of the normal four-year period, claiming that defendants' fraudulent concealment of their conspiracy had tolled the statute of limitations. The district court granted a motion for partial summary judgment, declaring that the Government did know, or should have known, of the alleged conspiracy prior to January 1, 1968. This finding, insists USG, estops the Government from denying delay in this case.

In *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F. 2d 840, 844 (3d Cir. 1974), Judge Garth noted three requirements that must be satisfied before collateral estoppel will apply:

a) The issue decided in the prior litigation must be identical with the issue presented in the action in question;

b) The prior litigation must have resulted in a final judgent [sic] on the merits; and

c) The party against whom the estoppel is asserted must have been a party or in privity with a party, to the prior adjudication.

USG's claim does not satisfy the first requirement. Governmental knowledge sufficient to preclude reliance on the doctrine of fraudulent concealment in a *civil* case is not identical with the availability of evidence sufficient to support the decision to bring *criminal* charges against the same defendants. Proof of the existence of the former does not entail proof of the existence of the latter. Therefore, there can be no collateral estoppel.

Having found no undue delay, we note that, in any event, appellants have not met their burden of proving substantial prejudice. In *United States v. Dukow*, 453 F. 2d 1328 (3d Cir.), *cert. denied*, 406 U. S. 945, 92 S. Ct. 2042, 32 L. Ed. 2d 331 (1972), this court, following *Marion*, refused to order the dismissal of an indictment where no substantial prejudice was shown. *Accord*, *United States v. Benson*, 487 F. 2d 978, 984-85 (3d Cir. 1973). In *Dukow*, Judge Adams held the deaths of two potential witnesses not prejudicial, because there had been neither an offer of the testimony they would have given nor any indication that they possessed unique knowledge of the transaction in question. *Dukow, supra*, 453 F. 2d at 1330. Here, as in *Dukow*, appellants argue that potential witnesses died in the lengthy interval between initial investigation and trial, but there is no showing that the deceased would have proffered testimony not merely cumulative of the evidence already at appellants' disposal.

Of the thirty-six deceased potential witnesses listed, only three received particular attention from appellants. One was Melvin Quayle, who was depicted in other testimony as an emissary of the other alleged conspirators. Quayle's denial before the grand jury of this role was read at trial. Appellants do not suggest that he would have testified any differently had he lived.

Appellants also insist that Donald Miller, late merchandising manager of Celotex, "would have made an excellent witness for the defense." They vouchsafe no reason to believe, however, that Miller's testimony would have been significantly more exculpatory than that offered by other witnesses.

Finally, appellants single out a USG memorandum of June 6, 1961, as a document the Government was able to exploit because its author, B. J. Nabors, was dead. Appellants, though, were free to offer alternative explanations of the document's contents. Moreover, Nabors died in 1967, ten months before the date on which USG claims the Government should have known of the conspiracy and sought an indictment. Cases of this magnitude often last so long that documents are introduced when the authors are no longer available to dispel any inculpatory impressions the documents may create. To hold that this handicap, by itself, is a violation of due process would be to erect a practical barrier to suits of this sort.

Appellants argue that under *United States v. Barket*, *supra*, the Government bears the burden of proving that none of the unavailable witnesses possessed exculpatory evidence. We find this argument unpersuasive. *Barket* differs from the case *sub judice* in several important respects. First, the procedural posture of *Barket* was the reverse of that here: the district court had granted the motion to dismiss the indictment. Second, the *Barket* court expressed grave misgivings about the merits of the

Government's case. Third, the Eighth Circuit found the Government guilty of culpable negligence in delaying Barket's indictment. Fourth, and most important, the *Barket* cou. t explicity found that "Barket's ability to defend himself on the crucial issue" had "undoubtedly" been impaired. *Id.* at 193.

None of these conditions obtains in the case before us. Because the court below refused to dismiss the indictment, we can order it dismissed only if we hold the district court's findings clearly erroneous. We are unable to take the frankly skeptical view of the Government's case on the merits, adopted by the *Barket* court. As we have already noted, the Government did not cause any undue delay in this case. Most importantly, we do not find that appellants' ability to defend themselves was impaired. Because the *Barket* court explicitly reached the opposite conclusion, its statement concerning the burden of proof on the issue of missing witnesses' possession of exculpatory evidence was dictum.[5] And were the statement indeed necessary to the result in *Barket*, we would see no reason to depart from the clear teaching of *Dukow* and impose upon the Government the burden of proving that none of the unavailable witnesses possessed significant, exculpatory evidence. *See, e.g., United States v. McGough*, 510 F. 2d 598, 604 (5th Cir. 1975).

5. In concluding that the Government bears the burden of proving that no unavailable witness would have offered significant, exculpatory evidence, the *Barket* court relied on *United States v. Norton*, 504 F. 2d 342 (8th Cir. 1974), *cert. denied*, 419 U. S. 1113, 95 S. Ct. 790, 42 L. Ed. 2d 811 (1975). Norton, however, involved an unusual situation. The Government intentionally delayed its arrest of Norton on drug charges so that its informant, a key witness, could remain undercover and gather evidence for other prosecutions. Before Norton's arrest, the informant was murdered. The Eighth Circuit held that the Government had to accept the risk that its conscious decision to delay Norton's prosecution might result in the unavailability of a witness necessary to guarantee Norton a fair trial. Therefore, the burden of showing the informant's lack of exculpatory evidence was placed on the Government. Norton, however, was held to have waived the right to argue that the delay had prejudiced his defense, because he had rejected the Government's offer of proof on the issue of the informant's probable testimony. *Id.* at 345.

Whatever the merits of the *Norton* holding in the context of informant cases, we do not believe that it should be extended beyond that special context. An informant in a drug case is a potential witness who may be presumed to possess unique knowledge about the transaction. *Rovario v. United States*, 353 U. S. 53, 64, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957). No such special presumption attaches to the usual witnesses in other cases. *See United States v. Dukow*, 453 F. 2d 1328, 1330 (3d Cir.), *cert. denied*, 406 U. S. 945, 92 S. Ct. 2042, 32 L. Ed. 2d 331 (1972).

III.

Thorough scrutiny of the voluminous record and careful consideration of the many issues raised on appeal convinces us that reversal is required.

A.

The Government's case on price fixing centered on a practice appellants call "verification." An officer of one gypsum board manufacturer would telephone a competing firm's officer to determine the price at which the competitor was offering gypsum board to a specific customer. The scope, purpose, and duration of this activity are sharply disputed by the parties. The Government contends that the purpose of verification was to enable competitors to stabilize prices and "police" agreed-upon increases, that the calls involved broad discussions of present and future pricing policies, that the appellants verified daily, and that they continued to do so until 1973. Appellants insist that the only purpose of the calls was to ensure compliance with the Robinson-Patman Act (discussed below), that the conversations were limited in scope and number, and that the practice had been discontinued, except for a few iso-

lated, unauthorized calls, before the start of the applicable limitations period, December 27, 1968. There is evidence to support each claim of both sides.

Appellants contend, however, that the court below erred in instructing the jury on the legal status of the practice. Although appellants assert that the evidence demonstrated that the purpose of certification was to comply with the Robinson-Patman Act, the trial court instructed the jury that any purpose was irrelevant so long as the jury found that verification had a stabilizing effect on prices.[6] The refusal to instruct the jury about the relevance of purpose was, for the following reasons, reversible error.

Section 2(a) of the Robinson-Patman Act, 15 U. S. C. § 13(a),[7] prohibits sellers from discriminating in price be-

6. On this point, the court charged as follows:

> Secondly, you must determine whether the purpose for the exchange of competitive information between the Defendants and their alleged coconspirators was to insure a good faith meeting of competition, as a defense to the Robinson-Patman Act.
>
> If you decide that, if you decide this was merely done in a good faith effort to comply with the Robinson-Patman Act, then you could not consider verification, standing alone, as establishing an agreement to fix, raise, maintain, and stabilize prices as charged.
>
> However, *if you decide that the effect of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these exchanges as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain and stabilize list prices.*

(Emphasis added).

7. Section 2(a) reads in pertinent part as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the ef-

tween different purchasers of the same commodity. Section 2(b), 15 U. S. C. § 13(b),[8] permits a seller to rebut a prima facie case under 2(a) by "showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." The Supreme Court has held that Section 2(b) places

> on the seller the burden of showing that the price was made in good faith to meet a competitor's. . . . [T]he statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

Federal Trade Commission v. A. E. Staley Mfg. Co., 324 U. S. 746, 759-60, 65 S. Ct. 971, 977, 89 L. Ed. 1338

7. (Cont'd.)

fect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

8. Section 2(b) reads as follows:

> Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(1945). This court declared in *Viviano Macaroni Co. v. Federal Trade Commission*, 411 F. 2d 255, 259-60 (3d Cir. 1969), that the seller cannot meet this burden merely by accepting the purchaser's word with respect to competitor's offers; instead the seller must attempt to corroborate the report, as well as the reliability of the purchaser or other reporter.

Appellants claim that their verification practice was designed to comply with the dictates of *Staley* and *Viviano*. They assert that almost all discounting off list prices was not reflected in invoices, rendering that form of corroboration ineffective. In addition, they say, purchasers of the gypsum board were notoriously unreliable and often were discovered to have lied about a competitor's offer in order to "whipsaw" a price cut. There is evidence to support these assertions. Therefore, argue appellants, they had three choices: (1) offer the reduced price on the basis of the purchaser's unconfirmed report and risk Robinson-Patman liability; (2) forego the price cut and risk losing the sale; or (3) call the competitor, verify his offer, and establish a section 2(b) defense to any Robinson-Patman charge concerning the price cut.

The countervailing policies of section 1 of the Sherman Act, however, complicate appellants' exposition of the issue. The Supreme Court has dealt several times with the limits imposed by the Sherman Act on exchanges of information among competitors. In *American Column & Lumber Co. v. United States*, 257 U. S. 377, 42 S. Ct. 114, 66 L. Ed. 284 (1921), the Court held that section 1 of the Sherman Act condemned the exchange of specific price information with regard to specific customers, where the clear purpose was to stabilize prices. The Court reached the same result in *United States v. American Linseed Oil Co.*, 262 U. S. 371, 43 S. Ct. 607, 67 L. Ed. 1035 (1923).

Then in 1925, two cases upheld the exchange of information among competitors. In *Maple Flooring Ass'n v. United States*, 268 U. S. 563, 45 S. Ct. 578, 69 L. Ed. 1093 (1925), the Sherman Act was held to permit the exchange of average cost data relating only to closed transactions, despite an apparent stabilizing effect on price, where no intent to constrain individual competitive activity was found. And the Court in *Cement Manufacturers Protective Ass'n v. United States*, 268 U. S. 588, 45 S. Ct. 586, 69 L. Ed. 1104, approved the exchange of specific price information concerning specific customers, despite possible effects on prices, where the purpose of the dissemination scheme was to prevent buyers from defrauding sellers.

The Supreme Court has drawn a narrow line in deciding the data dissemination cases under section 1 of the Sherman Act. The difficulty derives from the fact that in competitive markets, information exchanges promote competition, while in oligopolistic markets, they depress competition. *United States v. Container Corp. of America*, 393 U. S. 333, 342-43, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969) (Marshall, J., dissenting); P. Areeda, Antitrust Analysis 13-16 (1974). Thus, the Court has attempted to fashion rules that will reach the latter, yet not amount to broad proscriptions embracing the former.

In *Container, supra*—the most recent data dissemination case—the facts were similar to those presented in the case *sub judice*. Eighteen manufacturers of corrugated containers accounted for 90% of the shipments on such products from the southeastern United States. The industry exhibited excess capacity and a downward trend in prices, yet twenty-one new competitors entered the industry during the period covered by the complaint—a clear indication that prices were above competitive levels. Containers were produced to customer specifications, but were substantially identical regardless of manufacturer. With a

few exceptions, no manufacturer could command a higher price than another. From 1955 to 1963, defendants exchanged with varying frequency the prices most recently quoted to specific customers. No Robinson-Patman defense was raised, however.

The Supreme Court, 6-3, found a combination or conspiracy proscribed by the Sherman Act. The freedom to supply information only if each defendant so chose was described merely as the freedom to withdraw from the agreement. From the concentrated nature of the industry, the majority concluded that the information exchanges must have set a floor under prices. The Court distinguished *Cement Manufacturers, supra,* by pointing out that *Container* revealed no "controlling circumstance, *viz.*, that cement manufacturers . . . exchanged price information as a means of protecting their legal rights from fraudulent inducements . . . ." *Id.* at 335, 89 S. Ct. at 511.

Mr. Justice Fortas concurred, declaring that he did not understand the majority to have established a *per se* ban of such exchanges. Instead, he concluded that the record supported a finding that the data dissemination had in fact affected prices. *Id.* at 388-40, 89 S. Ct. 510 (Fortas, J., concurring). Justice Marshall, joined by Justices Harlan and Stewart, dissented. He agreed that exchanges of price information were not illegal *per se*, but he disagreed with Justice Fortas' conclusion that the record showed any effect on prices. *Id.* at 340-47, 89 S. Ct. 510 (Marshall, J., dissenting).

Each of the *Container* opinions found an agreement in the reciprocal dissemination of price information. The discord arose over proof of the agreement's effect. None of the Justices concerned himself with the agreement's purpose. The Court's careful distinction of *Cement Manufacturers*, however, suggests that proof of an actual pur-

pose is not irrelevant in all cases. Where the information exchange occurs under a "controlling circumstance," such as the purpose of preventing fraud in *Cement Manufacturers,* the exchange can be upheld under the Sherman Act, despite a proven or presumed effect on price.[9]

The question before us is whether appellants' alleged desire to establish a defense, to price discrimination charges, of compliance with section 2(b) of the Robinson-Patman Act would create a similar "controlling circum-

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9. If purpose were always irrelevant, as Judge Weis's dissent declares, then the *Container* Court would effectively have overruled. *Cement Manufacturers. See The Supreme Court,* 1968 Term, 83 Harv. L. Rev. 7, 234-5 (1960 [sic]). Yet the vitality of *Cement Manufacturers* has been reaffirmed by favorable citation in *Goldfarb v. Virginia State Bar Ass'n*, 421 U. S. 773, 781, 95 S. Ct. 2004, 44 L. Ed. 2d 486, *reh. denied*, 423 U. S. 886, 92 S. Ct. 162, 46 L. Ed. 2d 118 (1975), and *United States v. Citizens & Southern Nat'l Bank*, 422 U. S. 86, 113, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975). Those cases also cite Justice Fortas's *Container* concurrence, suggesting that *Container* did not establish a *per se* rule against information exchanges, but left some to qualify as legitimate under the Sherman Act.

Judge Weis's dissenting opinion also attempts to liken the factual setting in the case *sub judice* to that found violative of the Sherman Act in *Container*. The dissent notes that the district court in *Container* found that buyers "on occasion" furnished inaccurate information as to competing sellers' prices, *see United States v. Container Corp. of America*, 273 F. Supp. 18, 28 (M. D. N. C. 1967), and held that the desire to prevent fraud took the container manufacturers outside the Sherman Act ban.

All this is irrelevant to the case at hand. Here, fraud is not at issue. Indeed, the *Container* opinion makes it clear that mere bad faith bargaining does not amount to "fraud" in the *Cement Manufacturers* sense.

What appellants urge here, though, is not a desire simply to avert occasional bad faith bargaining, but to comply with the positive duties imposed by another statute, the Robinson-Patman Act. The Robinson-Patman defense was not raised by the *Container* defendants at trial and was argued to the Supreme Court merely as an afterthought. That Court did not deal with it.

The question before us, then, is not whether occasional, or even widespread, buyer prevarication justifies price information exchanges, but whether the commands of Robinson-Patman may sometimes do so, when accommodated to Sherman Act strictures.

stance" that would legitimate an agreement otherwise prohibited by section 1 of the Sherman Act. If it would, then the trial court's instruction was improper in permitting the jury to convict appellants merely by finding an effect on prices, with no consideration of purpose. The Government denies that compliance with section 2(b) amounts to a "controlling circumstance." *Container*, claims the Government, limited "controlling circumstances" to prevention of fraud.

We do not read that case so narrowly. If the *Container* Court had sought to restrict the exception to "prevention of fraud," it could have distinguished *Cement Manufacturers* by noting simply that the *Container* case did not involve an attempt to thwart fraudulent purchasing practices, as had *Cement Manufacturers*. Instead, the Court used that much broader term "controlling circumstance," one of which was the desire to prevent fraud present in the latter case. This suggests that there are "controlling circumstances" other than the one delineated in *Cement Manufacturers*.

Price verification, insist appellants, must be considered a controlling circumstance. They claim that otherwise the very activity dictated by the Robinson-Patman Act could be used as evidence of conspiracy to convict under the Sherman Act. This conflict between the two acts would leave them with their three unappealing alternatives: (1) forego the price cut and probably lose a sale; (2) cut the price and risk a Robinson-Patman charge, if the buyer was lying; or (3) verify the price and risk the Sherman Act charge involved here.

The Government replies that nothing in the Robinson-Patman Act condones discussions about prices among competitors, nor has any court ever required such discussions as a condition of establishing a section 2(b) defense.

Section 2(b), says the Government, does not force appellants to verify. The Government poses its alternatives for the appellants: (1) refrain from cutting prices to the single buyer; (2) cut prices as to all buyers. In neither event will the seller break either antitrust law.

Even the Government concedes that this choice is "difficult." We fear that so limiting sellers' alternatives would discourage price competition in industries like gypsum board, where the fact that price cutting occurs off list prices and invoices makes corroboration of reported competitor's offers difficult or impossible. In such industries, the Government's alternatives would eliminate the section 2(b) defense. This, it seems to us, would be more likely to put a floor under prices than to induce wholesale cutting, since a firm in a concentrated industry would be unlikely to reduce prices across the board simply to close a single sale. Report of the Attorney General's National Committee to Study the Antitrust Laws 181 (1955). And it is through isolated price reductions that established price levels are eroded, precipitating widespread price cuts. P. Areeda, *supra*, at 231. The Government's position, then, could induce greater price rigidity.

Because the Government's resolution of the conflict between the Sherman and Robinson-Patman Acts would require us to read the Sherman Act as discouraging the very price competition it was designed to promote, we reject that resolution. Appellants, however, seek an accommodation of the two acts that would recognize any bona fide attempt to comply with section 2(b) of Robinson-Patman as a "controlling circumstance" for Sherman Act purposes. Anticompetitive dangers exist on this side, too. Such a resolution would countenance a broad range of data dissemination schemes and communications among competitors, which might provide camouflage for illegit-

imate agreements. With this problem in mind, we turn to the cases that have already addressed this issue.

Except for the court below, each court to consider the issue has agreed with appellants that the attempt to establish a 2(b) defense amounts to a "controlling circumstance" that shields those exchanging information from Sherman Act liability. The first and most apposite case involved a civil action alleging essentially the same conspiracy charged here. In *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N. D. Cal. 1971), the court found that manufacturers of gypsum board, because their products were homogeneous, deemed it essential to meet lower offers by competitors. Purchasers aggressively played one manufacturer against another, whipsawing a series of price cuts through the industry by falsely reporting lower offers. When purchasers told sellers' field representatives of competitors' lower offers, the representatives asked for invoices or other written corroboration, but these requests usually proved fruitless. In order to insulate themselves against possible Robinson-Patman liability, specific company officials were given authority to communicate with the competitor in question. This communication took place "[only] after exhausting other means of confirming the truth of such reported deviation." *Id.* at 309. Specific confirmation was obtained, and no reported offers were met unless verified. The *Wall Products* court held that this activity amounted to a "controlling circumstance" contemplated by *Container*. 326 F. Supp. at 312.

The three other cases that involved this issue shared similar facts. In each, a major oil company conferred with its competitors during a gasoline price war, in order to verify its competitors' prices before granting temporary allowances to its own local retailer Although it is not made clear in *Webster v. Sinclair Refining Co.*, 338 F. Supp. 248 (S. D. Ala. 1971), whether the defendant communicated directly with competitors or merely observed publicly posted prices, the court must have thought that there was direct communication. It stated that obtaining information from competitors does not violate section 1 of the Sherman Act if the "controlling circumstance" of Robinson-Patman compliance is present, citing *Wall Products*, 338 F. Supp. 251-52.

In *Belliston v. Texaco, Inc.*, 455 F. 2d 175 (10th Cir.), *cert. denied*, 408 U. S. 928, 92 S. Ct. 2494, 33 L. Ed. 2d 341 (1972), the competitors exchanged price information that was also publicly available through trade journals and financial dailies. *Id.* at 181. The court cited *Wall Products*, however, for the broad proposition that price information exchanges for the purpose of establishing a Robinson-Patman defense amount to a "controlling circumstance." *Id.* at 182.

The third gasoline war case was *Gray v. Shell Oil Co.*, 469 F. 2d 742, 746-47 (9th Cir. 1972), *cert. denied*, 412 U. S. 943, 93 S. Ct. 2773, 37 L. Ed. 2d 403 (1973). There the court held that the jury had to decide whether the purpose of Shell's communications with its competitors was to comply with the Robinson-Patman Act. Because the jury had found that purpose, the court upheld a verdict of no liability, citing *Belliston, supra.*

First, it should be noted that the three gasoline war cases significantly expanded the *Wall Products* holding. None contained any suggestion that alternative means of corroboration, such as invoices or public trade papers, were unavailable, as they had been in *Wall Products*. Indeed, the *Belliston* court expressly found that they were available. None indicated that the gasoline retailers had achieved the same reputation for mendacity that the *Wall Products* court ascribed to wallboard buyers. The gasoline war cases, then, suggest that the category of price exchanges that qualify as "controlling circumstances" is quite

broad. So free a license to exchange price information might undermine the *Container* holding.

Second, these cases diluted the pro-competitive strength of the Sherman Act in order to preserve the force of Robinson-Patman's requirement of solid corroboration. Yet *Automatic Canteen Co. v. Federal Trade Commission*, 346 U. S. 61, 73 S. Ct. 1017, 97 L. Ed. 1454 (1953), suggests that when policies of the Sherman and Robinson-Patman Acts conflict, it is the Robinson-Patman Act that should give way. In *Automatic Canteen*, a buyer was charged with violating section 2(f) [10] of the Robinson-Patman Act, which forbids inducement of a discriminatory price. The question before the Court was which party—the FTC or the defendant—had the burden of producing evidence on the issue of the seller's costs, information that might demonstrate that the varying prices were not in fact discriminatory. The Court refused to place the burden of discovering the seller's costs upon the buyer because, among other things, "it would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies," *id.* at 69, 73 S. Ct. at 1022, that is, section 1 of the Sherman Act.

We are therefore reluctant to embrace the accommodation fashioned by the gasoline war cases, which seems to eviscerate the Sherman Act for the benefit of Robinson-Patman. The best way to resolve the dilemma framed by appellants in this case, in the light of *Automatic Canteen*, would be to ease their burden under Robinson-Patman, instead of facilitating evasions of the Sherman Act's pro-competitive strictures as did the gasoline war cases. If Robinson-Patman is interpreted to permit a seller lacking other corroboration to cut his price without taking the ultimate corroborative step of verifying the purchaser's report with his competitor, then the Sherman Act and *Container* retain more vigor. We think *Wall Products, Viviano,* and a recent case in the Sixth Circuit outline such a solution to appellants' alleged dilemma.

In *Kroger Co. v. Federal Trade Commission*, 438 F. 2d 1372 (6th Cir.) *cert. denied*, 404 U. S. 871, 92 S. Ct. 59, 30 L. Ed. 2d 115 (1971), the Sixth Circuit affirmed an FTC finding that Kroger had induced a discrimination in price, in violation of section 2(f) of the Robinson-Patman Act. In soliciting bids for sale of private label milk, to its chain of grocery stores, Kroger falsely told Beatrice Foods that it had received a bid twenty percent off list price from another dairy. The FTC found that Beatrice attempted to corroborate Kroger's report, but did not contact its competitor directly. *Beatrice Foods Co.*, 76 F. T. C. 719, 809-11 (1969). Relying on Kroger's false report, Beatrice cut its price to Kroger. Both Beatrice and Kroger were charged with violating the Robinson-Patman Act. The FTC, however, held that Beatrice had established the "good faith meeting competition" defense under section 2(b). Despite this finding that the price was not illegal as to the seller, Kroger was held to have induced a discriminatory price. The FTC declared that Beatrice could not be held liable for the discriminatory effect of the price, because it had no reason to disbelieve Kroger. The Sixth Circuit affirmed the ruling that Kroger could nevertheless be held to have known that the price it induced was in fact discriminatory. *Kroger, supra*, 438 F. 2d at 1376-77.

The *Kroger* case, when combined with the *Wall Products* decision and our *Viviano* holding, offers a solution to the quandary in which appellants claim to find themselves. *Kroger* indicates that sellers can establish a section 2(b)

10. Section 2(f), 15 U. S. C. § 13(f), reads as follows:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

defense without taking the ultimate corroborative step of communicating directly with their competitors. It accomplishes this by holding the purchaser to a high standard of good faith bargaining under section 2(f). Thus, as long as the seller has taken all other reasonable steps in an attempt to corroborate his purchaser's report of lower offers, he need not fear Robinson-Patman liability, provided that—as in *Kroger*—he has no independent reason to doubt the purchaser's reliability.

Viviano, though, requires the seller to investigate that reliability. *Viviano, supra,* 411 F. 2d at 259. This holding protects the integrity of the section 2(b) defense. If the seller could discriminate in price when he had good reason to believe that the buyer—even a buyer held to a high standard by *Kroger*—was lying about a competitor's supposedly lower offer, then the "good faith" requirement of section 2(b) would be rendered nugatory. Therefore, if previous experience or the investigation required by *Viviano* reveals that the purchaser cannot be trusted, as was the case in *Wall Products, supra,* 326 F. Supp. at 309, then, and only then, the seller may communicate with his competitor to test the buyer's veracity. The presence of this doubt as to the purchaser's truthfulness, combined with the seller's inability to corroborate the buyer's reports independently, creates the "controlling circumstance" that exempts price information exchanges from the Sherman Act ban, under *Container*. This is a narrow "controlling circumstance," not the broad one of the gasoline war cases.

There was some evidence of this narrow "controlling circumstance" in this case. Several witnesses testified that the purpose of the "verification" calls was to establish a Robinson-Patman defense and that their scope was confined by that purpose. There was also testimony concerning the unreliability of purchasers in the gypsum board market. Therefore, appellants were entitled to an instruction that their verification practice would not violate the Sherman Act if the jury found: (1) the appellants engaged in the practice solely to comply with the strictures of Robinson-Patman; (2) they had first resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; and (4) their communication with competitors was strictly limited to the one price and one buyer at issue. Trial court charged instead that if the jury found that verification had an effect on prices, they had to find guilt under the Sherman Act. Because this charge improperly ignored *Container's* exception for price information exchanges carried out under a "controlling circumstance," reversal is required.

B.

Appellants also contend that, on the state of the evidence, they were entitled to a more precise charge on the purpose and scope of the conspiracy any particular defendant was alleged to have joined. The Government insists that the trial court's charge on this point was sufficient and that appellants waived their objections in any event. I agree with appellants that the court's charge was deficient. Finding no waiver, I would order reversal on this point.[11]

Over a period of five months, the Government introduced masses of evidence concerning a multitude of seemingly unrelated events and attempted to link them together to show a single, overall conspiracy to stabilize the prices and marketing conditions of gypsum wallboard. Most of this evidence dealt with actions prior to the start of the applicable limitations period. In these circumstances, it was necessary specifically to inform the jury that any par-

11. Neither Judge Adams nor Judge Weis agrees with this view.

ticular defendant could be found guilty of conspiracy only if he understood that he had joined the single, overall agreement charged in the indictment; participation in any of the subsidiary events was not enough. *United States v. Peoni*, 100 F. 2d 401, 403 (2d Cir. 1938); *accord, United States v. Purin*, 486 F. 2d 1363, 1369 (2d Cir. 1973), *cert. denied sub nom. Da Silva v. United States*, 416 U. S. 987, 94 S. Ct. 2392, 40 L. Ed. 2d 764 (separate appeal), *cert. denied sub nom. Purin v. United States*, 417 U. S. 930, 94 S. Ct. 2640, 41 L. Ed. 2d 233 (1974) (separate appeal). The great number of activities in evidence and the huge cast of characters involved made it essential to impress upon the jury that each defendant could be found guilty of the conspiracy charged only if that overall design was within his reasonable contemplation when he engaged in any of the isolated activities. Specifically, the jury should have been asked to decide whether a given defendant, by engaging in one or more of the apparently isolated events, was associating himself with the overall agreement charged in the indictment. *United States v. Borelli*, 336 F. 2d 376, 385 (2d Cir. 1964), *citing Peoni, supra*, 100 F. 2d at 403. This the trial court did not do.

Trial court did—as did the trial court in *Borelli, supra*—repeatedly instruct the jury that each defendant could be found guilty only if he knowingly joined the conspiracy charged and that guilt was to be determined on an individual basis.[12] But this left the jury—like the jury in

12. Relevant portions of the charge are as follows:

Now I want to charge you at this time that it is your duty to give separate consideration to the charges against each of the Defendants, whether they were a corporation or an individual.

Each must be passed upon by you separately. You may find all the Defendants guilty. You may find all of the Defendants not guilty or you may find some guilty and some not guilty.

This depends on the facts as you find them and the inferences which you deem appropriate to draw from those charges. . . .

Borelli—free to find that a defendant automatically associated himself with the overall conspiracy charged merely by participating in one or a few of the acts alleged to be individual elements of the grand design. In this sense, the findings of guilt may have been "all-or-none": once

12. (Cont'd.)

An individual's membership in a conspiracy must be established by evidence as to his own conduct, what he, himself, knowingly said or did. . . .

Now, there has been an issue raised that, even if—and it is, of course, denied there ever was a conspiracy—but it is contended that, even if one did exist, the Defendants or certain of them ceased to participate in any conspiratorial activity prior to December 27, 1968, and, therefore, cannot be found guilty, because they were not members of any conspiracy within the Statute of Limitations. . . .

Now, in any trial, such as this one, with several Defendants, there is danger that a Defendant will not be judged solely upon the evidence applicable to him. In this regard, you must consider the evidence as to each Defendant separately.

You have two questions to determine: First, whether there was a conspiracy to the character alleged in the indictment; and, second, if so, which of the Defendants, if any or all, were knowing participants in it. This involves an examination of the evidence, separately, with respect to each Defendant.

Now, in this instance—in this case, two of the Defendants are represented by one attorney. You still must examine the evidence as to each of those independently and reach your conclusion based on that evidence independently. Each defendant has the right to have you consider the evidence from his point of view—that is, you are to consider whether or not the evidence shows him individually guilty or not, and, unless you are convinced beyond a reasonable doubt of the guilt of a Defendant, you must return a verdict of not guilty as to that individual. . . .

In addition, you would not be warranted in finding any individual Defendant guilty, unless you find beyond a reasonable doubt that, knowing of the existence of the conspiracy, he took some action or authorized or directed the employment of one or more means and methods in furtherance of the conspiracy, as I explained to you earlier.

Thus, the trial court never explicitly told the jury that participation in one of the allegedly conspiratorial subsidiary events was insufficient, without more, to support a verdict of guilty.

an overall conspiracy was found as to some defendants, all of the defendants could have been connected to the conspiracy by their involvement in one of the minor agreements allegedly part of it. The court failed to emphasize that joining a subsidiary agreement would not constitute guilt unless it was done with the intent to join the overall conspiracy. This "all-or-none" basis for determining guilt is what bothered the *Borelli* and *Peoni* courts.

The *Borelli* court described the problem:

> The view that if the evidence warrants the finding that some defendants were parties to a single agreement to sell contraband for a nine-year period, it necessarily does so as to every defendant who has conspired with them at any time for any purpose, is thus a considerable oversimplification. Rinaldo's testimony thoroughly warranted the finding of an agreement among himself, Joe and Rosario Magavero beginning in 1950 and continuing through 1959. But it does not follow, for example, that his recital of two deliveries to Tantillo in March and July, 1951, on the instructions of Locascio in one instance, and of Rosario Mogavero in the other, would justify a finding that Tantillo had thereby made himself a part of whatever narcotics enterprises Locascio, the Mogaveros and their future partners might engage in for the rest of their lives, provided only that these were uninterrupted—a theorem that would lead to the inevitable but extraordinary conclusion that Tantillo's two purchases entered him into a "partnership in criminal purposes," *United States v. Kissel,* 218 U. S. 601, 608, 31 S. Ct. 124, 54 L. Ed. 1168 (1910), with Castiglia, who supplied a source to and took deliveries from an altered core seven years later, and *vice versa.*

Borelli, supra, 336 F. 2d at 384. Appellants here raise a similar concern. For example, it does not follow that appellant Brown's participation in the allegedly conspiratorial 1965 industry-wide price increase and 1966 change in credit terms—the only actions with which any evidence connected him—means that he associated himself with an overall conspiracy to stabilize prices beginning before 1960 and lasting until 1973. Each of the other appellants was likewise connected by the evidence only to a few of the dozens of allegedly conspiratorial episodes that the Government sought to weave into one overriding agreement. Yet the jury was never told that participation in one episode, without more, was insufficient to prove association in the latter enterprise.

In view of the ambiguity surrounding the scope of any agreement joined by each of the defendants, the trial court should have given the charge they requested on this point.[13] Conspiracy is "an elastic, sprawling and pervasive offense." *Krulewitch v. United States,* 336 U. S. 440, 445, 69 S. Ct. 716, 719, 93 L. Ed 790 (1949) (Jackson, J., concurring). Trial courts must take great pains to prevent the seine of a conspiracy charge from entangling a defendant only tangentially related to the agreement in question.

The Government's assertion that appellants waived any objection to the trial court's charge on this point is

13. The requested charge was as follows:

> Because the gist of the offense charged is a continuing agreement to raise, fix, maintain and stabilize prices of gypsum products, *it is essential for you to determine what kind of agreement or understanding, if any, existed as to each defendant.* Each defendant is chargeable with the acts of his or its fellow defendants and alleged co-conspirators only if the acts are done in furtherance of the joint venture as he or it understood it. No defendant is to be held responsible for what some of the alleged conspirators, unknown to the rest, do beyond the reasonable intendment *of the common agreement or understanding, if any, to which you may find him or it a party.*

(Emphasis added).

without merit. Defense counsel three times expressed their willingness to make a record by "particularizing" objections to each charge the trial court denied. On each occasion, the court observed that particular objections would consume too much time and that one blanket objection sufficed to make a record for all. Where the trial judge declares that he does not require further elucidation of the requests he has refused, there can be no waiver. *See Green v. Reading Co.*, 183 F. 2d 716, 719 (3d Cir. 1950); 3 C. Wright, Federal Practice and Procedure § 842 (1969). Hence, the lack of a specific objection to the refusal to give this specific charge does not bar appellants from raising it as error on appeal.

Contrary to the Government's claim, appellants submitted their requested charge in a timely manner. After telling counsel on June 27, 1975, what the substance of his charge would be, the trial judge invited written objections by July 2. On June 30, the court advanced that deadline one day, so that he could rule on the objections before closing arguments began. On July 1, appellants filed numerous objections and supplemental requests designed to meet the court's previous comments. Among them was the charge at issue here. Because of time constraints, the trial court did not then rule on the lengthy submissions. He indicated, however, that he would refer to them in formulating his charge.[14] Because the court

14. The trial court's comments were as follows:

> I will use them only for the purpose of my own guidance in my final charge, but they are just too late for me to pass on them as a supplemental request for charge, *as for guidance of counsel*. . . .

(Emphasis added).

The lateness the court mentions relates not to the submissions in general, but to the court's ability to rule on them *that day* so that counsel would be aware of the court's intent when making their closing arguments.

acknowledged on the record that appellants had timely called his attention to the points they wanted charged, the Government's assertion of waiver must fail.

C.

Appellants also question the sufficiency of the trial court's charge with respect to withdrawal from the alleged conspiracy. Where a continuing conspiracy is proven, each defendant who by affirmative action has completely disassociated himself from the agreement before the start of the limitations period is entitled to acquittal. *Hyde v. United States*, 225 U. S. 347, 369, 32 S. Ct. 793, 56 L. Ed. 1114 (1911). This abandonment may be effected by communicating it "in a manner reasonably calculated to reach co-conspirators." *Borelli, supra*, 336 F. 2d at 388. Proof of such communication need not involve evidence that the defendant directly informed each co-conspirator of his intent to withdraw.

> The formation of a criminal conspiracy or adherence to a criminal scheme may be shown by evidence either direct or circumstantial, in practice often taking a wide range, and we see no reason why the withdrawal should not be held susceptible to proof of the same character. It might, of course, be shown by a writing, or by an express oral agreement, and we think by conduct wholly inconsistent with the theory of continuing adherence.

Buhler v. United States, 33 F. 2d 382, 384 (9th Cir. 1929); *accord, Marino v. United States*, 91 F. 2d 691, 698 (9th Cir. 1937), *cert. denied sub nom. Gullo v. United States*, 302 U. S. 764, 58 S. Ct. 410, 82 L. Ed. 593 (1938). *See also United States v. Goldberg*, 401 F. 2d 644, 648-49 (2d Cir. 1968), *cert. denied*, 393 U. S. 1099, 89 S. Ct. 895, 21

L. Ed. 2d 790 (separate appeal), *cert. denied sub nom. Tannenbaum v. United States,* 394 U. S. 932, 89 S. Ct. 1202, 22 L. Ed. 461 (1969) (separate appeal); *Developments in the Law—Criminal Conspiracy,* 72 Harv. L. Rev. 920, 958 (1959).

Appellants introduced evidence of the resurgence of price competition, and other forms of competition, which could have convinced the jury that one or more of the defendants had abandoned any conspiracy to stabilize prices and other conditions before the start of the limitations period. They also requested a charge to the effect that active competition on price might amount to the "affirmative action" necessary to accomplish a withdrawal.[15] Trial court's charge, however, negated this theory of withdrawal. The court charged as follows:

> In order to find that a defendant abandoned or withdrew from a conspiracy prior to December 27, 1968, you must find from the evidence, that he or it took some affirmative action to disavow or defeat its purpose. Mere inaction would not be enough to demonstrate abandonment. *To withdraw, a defendant either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials.*
>
> Thus, once a defendant is shown to have joined a conspiracy, in order for you to find he abandoned the conspiracy, the evidence must show that the defendant took some definitive, decisive step, indicating a complete disassociation from the unlawful enterprise.

(Emphasis added).

As the court explained the meaning of "withdraw," it comprised only affirmative notification—which connotes direct announcement—and disclosure to law enforcement authorities. Either might constitute withdrawal, but the court, by limiting withdrawal to these two, improperly excluded other possibilities, such as conduct inconsistent with the theory of continued adherence.

The court did permit appellants to argue their theory of withdrawal to the jury. That opportunity did not salvage appellants' rights, however, because the court in its subsequent charge told the jury that they could not consider appellants' theory. Reversal is, in my opinion, required on this point.[16]

IV.

The judgments of conviction will be reversed and the case remanded to the court below.

15. The requested charge was as follows:

> Even if you find the existence of a conspiracy formed before December 27, 1968 and continuing thereafter you must acquit any defendant if it appears that he withdrew from such a conspiracy prior to the December 27, 1968 date. To withdraw from a conspiracy, a conspirator must take affirmative action. Resumption of competitive behavior, such as intensified price cutting or price wars, *could* constitute such affirmative action. If there is a reasonable doubt as to whether a defendant has withdrawn from the conspiracy charged, if any existed, prior to December 27, 1968, that defendant must be acquitted.

(Emphasis added).

This charge would not have told the jury "that merely the fact that somebody was in competition shows withdrawal from conspiracy," as the trial court feared; instead, it merely recognized appellants' right to have the jury apply their theory of withdrawal if the jury believed their evidence and drew the inferences they asked the jury to draw. While not a model charge on this point, it at least drew the court's attention to the improperly narrow scope of the charge actually given.

16. Neither Judge Adams nor Judge Weis agrees with this conclusion.

ADAMS, *Circuit Judge*, concurring.

While I concur in the reversal of the defendants' convictions, I am impelled to discuss one issue that Judge Hunter has not addressed. That issue is whether the trial judge, in effect, directed the jury to reach definitive verdicts of guilty or not guilty. A determination that the verdicts were so induced would, of course, reinforce the conclusion reached by Judge Hunter.

I.

After a nineteen week trial, the jury began its deliberations in the afternoon of Tuesday, July 8, 1975. On each of the next two days (Wednesday and Thursday), the jury deliberated from 9:00 a.m. until 10:00 p.m.

On Friday, July 11, the fourth day of sequestered deliberations, the trial court advised counsel that "[s]ome of the jurors aren't feeling well" and that "[s]ome are tired." [1] The judge suggested a weekend cessation in the deliberations to reduce the "strain" on the jury, but defense counsel objected. The district court then summoned the jury foreman who, in the presence of counsel, reported that some jurors were "crying" and that others were concerned about being "away from home for a long time." [2] However, the foreman also stated that the deliberations were "going as well as can be expected." [3] As a result of this report, the trial court decided that deliberations would terminate each day at 6:30 p.m. instead of 10:00 p.m.

On Saturday, July 12, the judge, in open court, ordered the jurors to continue their deliberations. He did

1. Transcript at 15,128.

2. *Id.* at 15,135.

3. *Id.* at 15,136.

so, using a supplemental instruction previously approved by this Court in *United States v. Fioravanti*.[4]

Late on Sunday, the sixth day of deliberations, the jury notified the court that it could not reach a verdict. A note addressed to the judge declared: "We cannot reach a unanimous verdict. If any juror changes his mind now, he would only change due to compassion for his fellow jurors." [5] In response to this note, the judge assembled the jury and, in the presence of counsel, again gave the *Fioravanti* charge. When the jury retired, the judge informed counsel that he would not quickly declare a mistrial after a nineteen week trial.

On Monday, July 14, the seventh day of deliberations, the court received another note from the jury. This message stated that the foreman wished to "discuss the condition of the jury" and to "seek further guidance" from the judge.[6] The trial judge informed counsel that he would confer privately with the foreman, with a court reporter present, and would impound the transcript of the con-

4. 412 F. 2d 407 (3d Cir.), *cert. denied sub nom., Panaccione v. United States,* 396 U. S. 837, 90 S. Ct. 97, 24 L. Ed. 2d 88 (1969).

Basically, the *Fioravanti* charge outlines the responsibilities of each juror during deliberations, including the duties to re-examine one's own predilections and to deliberate with a view towards reaching a verdict, if possible. For the text of the recommended instruction, see 412 F. 2d at 420.

In this Circuit at least, the *Fioravanti* charge supersedes a supplemental instruction approved in *Allen v. United States,* 164 U. S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896). In essence, the *Allen* charge cautioned the minority within a jury to "see the error of its ways." 412 F. 2d at 417. Caustically denominated as the "dynamite" charge (*see Green v. United States,* 309 F. 2d 852, 853 (5th Cir. 1962)), the *Allen* instruction had been criticized by eminent scholars and jurists as having an inherently coercive influence on jury deliberations. Consequently, this Court suggested the more neutral statement of juror responsibilities embodied in the *Fioravanti* instruction.

5. Docket entry 322, #24.

6. Transcript at 15,164.

ference. He went on to say, however, that if the parties objected, the foreman's request for a meeting would be denied. When the parties did not object to the proposed conference, though defense counsel did express serious reservations,[7] the judge spoke with the foreman in a room adjacent to the court. The transcript of the discussions then was impounded, despite renewed and repeated requests for it.[8] Indeed, it was not until this Court ordered its disclosure, pursuant to a post-trial motion by defendants, that they learned what the transcript contained.[9]

During the meeting between the judge and the foreman, the foreman initially reported on the health of the jury. He represented that the jurors were "distraught" and "sick," with "at least eight of the jurors . . . taking some kind of pill." [10] The foreman next stated that "personality conflicts on the jury" had impeded their discussions, but that the jurors "have overcome those [conflicts].[11] Finally, the foreman declared that, in his opinion, the jury was deadlocked: "We have taken enough ballots now, and we have had enough discussions, and the way it is divided is not going to be settled by any document, any remembrance of testimony." [12] When the trial judge inquired whether the "jury is hopelessly deadlocked and will never reach a verdict," the foreman responded in the affirmative.[13]

At the end of the conference, the following critical exchange occurred:

7. *Id.* at 15,165-71.

8. *Id.* at 15,174-75.

9. Order of the Court of Appeals for the Third Circuit, dated September 16, 1975.

10. Conference Transcript at 2.

11. *Id.* at 4.

12. *Id.* at 4.

13. *Id.* at 6.

> Mr. Russell [foreman]: * * * It is a situation I don't know how to help you get what you are after.
>
> The Court: Oh, I am not after anything.
>
> Mr. Russell: *You are after a verdict one way or the other.*
>
> The Court: *Which way it goes doesn't make any difference to me.*[14]

The trial judge then instructed the foreman to "tell [the jury] to keep deliberating and see if they can come to a verdict." [15]

Upon returning to the courtroom, the judge purported to summarize for counsel what had transpired during the conference. The judge first stated that "because of what [the foreman] calls personality differences between some members of the jury . . . he does not feel that they are ever going to be able to get over this." Thereafter, the court advised counsel that some of the jurors were "not feeling well," but that the foreman really did not "know if they are sick or aren't sick." The judge then announced that he had relayed a message to the jurors "to continue their deliberations."

Significantly, the judge did not tell counsel about the foreman's opinion that the jury was hopelessly deadlocked; did not indicate that the foreman was under the impression that the court wanted a definitive verdict either for the prosecution or the defendants; and did not mention the directive to the jury that it should "see if [it] can come to a verdict." Thus, it does not appear that the report on the substance of the discussions between the court and the foreman was accurate or even substantially accurate.[16]

14. *Id.* at 7. (emphasis added)

15. *Id.* at 8.

16. In his dissenting opinion, Judge Weis appears to emphasize the fact that, after the trial court's report to counsel, one of the

In any event, on the following morning, the eighth day of deliberations, the jury returned guilty verdicts against each of the defendants.

II.

Defendants contend that the trial court "coerced" a deadlocked jury into reaching its verdict. They maintain that the judge caused the jurors to deliberate at excessive lengths and despite illness and exhaustion. The defendants also argue that the repetition of even an approved supplemental charge inherently compelled a verdict. Finally, they assert that the district court impermissibly insisted upon a verdict, foreclosing the possibility of a hung jury. Since I believe that only the last claim—that the verdict was improperly induced—is valid, I shall confine my discussion to that proposition.

The factual linchpin of the defendants' contention that the court, in effect, "coerced" a verdict from the jury is the private conference between the foreman and the trial judge. There, as noted above, the foreman declared that he knew the court wanted a verdict "one way or the other." At that point, I believe, the trial judge possessed the affirmative obligation to make it clear to the foreman that the jury had the option of reaching no verdict, should juror unanimity prove impossible. Instead, by stating merely "which way it goes doesn't make any difference to me," there was effectively conveyed to the jury, through the medium of the foreman, the directive that only a

16. (Cont'd.)
defense lawyers "suggested that the appropriate point [for declaration of a mistrial] would be the following morning [Tuesday, July 15] . . ." However, it is reasonable to assume that, had this attorney known of the extent of the jury deadlock or that the court had in no way dispelled the foreman's belief that the court wanted a definitive verdict "one way or the other," he would have demanded an immediate mistrial.

verdict for the prosecution or a verdict for the defendants would be acceptable to the court. Such an admonition provides justification, in my view, for overturning the defendants' convictions.

Reversal on this ground would appear to be required by prior teachings of the Supreme Court as well as this Court. In a per curiam opinion in *Jenkins v. United States*,[17] the Supreme Court deemed as coercive a trial court's instruction to a jury that "You have got to reach a decision in this case." While the counterpart in the present situation was more subtle in nature, it does not appear to differ materially from the instruction proscribed in *Jenkins*. Nor is it any less coercive.[18]

This Court previously has provided a cogent delineation of the relevant principles governing judge-jury relations during the deliberative period. In *Fioravanti*,[19] we made it clear that a trial judge should not direct jurors to return a verdict, one way or the other, unless they have reached complete unanimity concerning the guilt or innocence of a defendant.

Speaking for a unanimous panel, Judge Aldisert posited:

> So long as the unanimous verdict is required in criminal cases, there will always be *three* possible decisions of the jury: (1) not guilty of any charge; (2) guilty of one or more counts of the indictment; and (3) *no*

17. 380 U. S. 445, 85 S. Ct. 1059, 13 L. Ed. 2d 957 (1965).

18. *Jenkins* does differ somewhat from the case at bar, as there the defective charge was given only two hours after the inception of jury deliberations. However, the variance in timing between that case and ours would not appear to be significant. In both situations, the judge made it known to the jurors that he wanted a definitive verdict, a request that soon after was rewarded. In *Jenkins*, the Supreme Court deemed such a procedure to be reversible error.

19. 412 F. 2d 407.

> *verdict* because of a lack of unanimity. The possibility of a hung jury is as much a part of our jury unanimity schema as are verdicts of guilty or not guilty. * * * [I]t is a cardinal principle of the law that a *trial judge may not coerce a jury to the extent of demanding that they return a verdict.*[20]

In our system of criminal justice, then, a jury need not, and may not, render a verdict if it is unable to attain agreement. To permit a trial judge to undermine a jury's prerogative of not returning a verdict would abrogate the protection that the right to a jury accords criminal defendants. Moreover, if jurors are encouraged to subscribe to verdicts to which they are not committed, merely to reach some definitive result upon judicial insistence, then the universal perception of jury verdicts as manifestations of reasoned agreement would have to be examined anew. Such reevaluation is unnecessary so long as we thwart efforts to preclude one bona fide outcome of jury deliberations—no verdict.

None of this is to suggest that jurors should not be encouraged to reach a verdict if unanimity is at all possible, or that the discretion of trial judges over declarations of mistrial should be restricted. Yet where a trial judge, in effect, eliminates the possibility of no verdict through comments to the jury, the validity of verdicts rendered by that jury should be called into question.

In the present case, it is evident that the jury had the mistaken impression, for whatever reason, that it must reach a verdict of guilty or not guilty. Yet, that impression was in no way dissipated by the trial court in its conference with the foreman, or at any time thereafter.[21] Indeed, the court's language seems to have confirmed the impression that a verdict of guilty or not guilty was required. This is especially so because the critical dialogue between the trial judge and the foreman occurred immediately after the court learned that the jury was so "hopelessly deadlocked" that the case was "not going to be settled by any document, and remembrance of testimony." In effect, the trial judge at that point took from the jurors their prerogative to render no verdict, should it have appeared to them, as the colloquy with the foreman so indicates, that unanimity was not attainable. Such encroachment on jury authority, and the concomitant proscription of a possible "no verdict" outcome, requires reversal of the defendants' convictions.

In my judgment, the jury issue present here warrants reversal, and such a conclusion buttresses the result reached by Judge Hunter.

III.

Having decided that the defendants' convictions must be reversed because of the jury question, I will comment but briefly on the matters considered by Judge Hunter.

I concur in Parts I, II and IIIA of Judge Hunter's opinion. As to Part IIIA, I do so, recognizing that the exception to Sherman Act liability that the § 2(b) proviso of the Robinson-Patman Act creates is a very narrow one. Sellers in prosecutions for verification activities face the difficult task of convincing the jury or the court, as the

20. 412 F. 2d at 416. (emphasis added)

21. While the district judge had assured counsel that he would give no instructions on the law during the conference, nor repeat the *Fioravanti* charge, in my view, the judge should have attempted to remedy the foreman's belief that only verdicts of guilty or acquittal were acceptable. If the judge felt constrained not to provide any legal instructions during the conference, because of the assurances afforded counsel, he could have summoned the jury and, in the presence of counsel, informed the jurors that no verdict was appropriate and, indeed, necessary should they be unable to reach unanimity. Here, however, the court failed to take any such steps.

case may be, that such activities do not constitute price-fixing but reflect a "controlling circumstance" beyond their power (*e.g.*, the lying buyer").[22]

With respect to the "conspiracy" and "withdrawal" issues,[23] it is questionable, in my view, whether the charge of the trial judge constituted reversible error. This is particularly so given the length of the trial and the unusually complex legal questions present in this litigation. Within the context of the complete charge and of the trial as a whole, the instructions as to these two issues would appear to be adequate. Even so, as the case must be retried, the district court would do well to incorporate in its charge, on remand, the suggestions set forth by Judge Hunter.

WEIS, Circuit Judge, dissenting.

A.

The majority opinion discusses the conflict between the Sherman and Robinson-Patman Acts and the resulting dilemma that a business concern may face in steering between this Scylla and Charybdis of commerce. However, the course charted by the majority to avoid these two hazards, while carefully considered, does not clear the shoals of *United States v. Container Corporation of America*, 393 U. S. 333, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969).

The trial judge charged the jurors that, standing alone, verification to comply with Robinson-Patman did not violate the Sherman Act; such activity, however, could be evidence of an illegal agreement despite a proper purpose if stabilization of prices resulted. The majority hold that this instruction was erroneous. They read *Container Cor-*

22. *United States v. Container Corp. of America*, 393 U. S. 333, 335, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969).

23. See Parts IIIB and C of Judge Hunter's opinion.

poration to allow an exchange of information with competitors in oligopolistic markets where:

1. the motive of the seller is compliance with Robinson-Patman;
2. he doubts the truthfulness of a buyer's report that lower offers by competitors have been made; and
3. the seller is unable to obtain independent corroboration of the buyer's representation.

This combination of factors is characterized as a "controlling circumstance." In the interest of brevity, it may be termed the "lying buyer" defense.

There are serious difficulties with this interpretation when the facts of the *Container* case are examined. The pertinent details in the case are not elaborated in the Supreme Court's opinion but must be gleaned from the extensive findings and opinion of the district court.[1] The trial judge determined that:

1. buyers furnished inaccurate, incomplete or misleading information on prices;
2. no defendant furnished a competitor his most recent price, except in response to a specific request;
3. verification was requested only when buyers were suspected of furnishing inaccurate information;
4. there was no agreement to exchange price data;
5. the information was not disseminated to the public or to customers generally; and
6. there was no proof that the exchange of data had the effect of stabilizing prices.

1. The case is reported at 273 F. Supp. 18 (M. D. N. C. 1967).

The district court concluded that the defendant's conduct was designed to "prevent the perpetration of fraud upon them," and thus was insulated by *Cement Manufacturers Protective Association v. United States,* 268 U. S. 588, 45 S. Ct. 586, 69 L. Ed. 1104 (1925). Although the district court did not discuss the Robinson-Patman issue, it was briefed by the parties on appeal to the Supreme Court.

The factual background of *Container* is strikingly similar to that of the case *sub judice,* except that these defendants do not deny the existence of an agreement to verify and the jury verdict establishes the fact of effect upon prices. These factors weigh the scales even more heavily on the side of the government. The buyers' behavior in the gypsum industry cannot be classified as a "controlling circumstance" exempting the agreement from the proscription of *Container* if in that case the Court condemned that very circumstance.

The defendants here have been found guilty of price fixing, and it is now well settled that such conduct is illegal even if the motives which inspire it are beneficent or altruistic, *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). In essence, the defendants contend that if price stabilization did occur as a result of their efforts to prepare a Robinson-Patman defense, then such an effect is only incidental and not prohibited. But Robinson-Patman does not mandate price verification with competitors in oligopolistic markets. Our opinion in *Viviano Macaroni Co., v. FTC,* 411 F. 2d 255 (3d Cir. 1969), does not go so far but requires only a reasonable inquiry into a buyer's veracity. That case does not compel an investigation which itself is illegal either because it results in price fixing or violates other provisions of law.

If the Robinson-Patman Act requires verification, even that which tends to stabilize prices, it is difficult to understand why the defendants' "purpose" to comply would be significant. Observance of a statutory requirement is legal whether or not the actor has knowledge of it. Thus, it may be seen that the defendants' use of "purpose" is to make it interchangeable with "motive." As *Socony-Vacuum, supra,* makes clear, that factor does not absolve those responsible for the forbidden anti-competitive effect. *See Maple Flooring Manufacturers Assn. v. United States,* 268 U. S. 563, 577, 585, 45 S. Ct. 578, 69 L. Ed. 1093 (1925).

I do not understand *Container* to expand the holding of *Cement Manufacturers,* but rather to confine it. The Supreme Court did not attempt to distinguish *Cement* in detail but there is a difference between that fact situation where a seller was bound by an existing contract to furnish material and that which obtains here where he is free to enter into a transaction or not as he chooses. *Container* was based on the premise that information exchanges in a restrictive market have the actual or theoretical effect of stabilizing prices and generally should not be tolerated, 393 U. S. at 337, 89 S. Ct. 510. In the oligopolistic setting, the control of price information by the seller reinforces his economic power in a manner inconsistent with the play of free market forces. This theory led the Supreme Court to reject the proposition that an exception should be made when the exchange of price information in a response to the "lying buyer," though obviously the opinion did not condone the purchaser's tactics.

I agree with the majority that *Belliston v. Texaco, Inc.,* 455 F. 2d 175 (10th Cir.), *cert. denied,* 408 U. S. 928, 92 S. Ct. 2494, 33 L. Ed. 2d 341 (1972), and *Gray v. Shell Oil Co.,* 469 F. 2d 742 (9th Cir. 1972), *cert. denied,* 412 U. S. 943, 93 S. Ct. 2773, 37 L. Ed. 2d 403 (1973), do not

fit within *Container*. Moreover, in my view *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N. D. Cal. 1971), does not follow the Supreme Court's opinion.

The trial judge in the case *sub judice* obviously grasped the significance of *Container* when he charged:

> "[I]f . . . the effect of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these [ex]changes as evidence of the mutual agreement . . . to raise, fix . . . and stabilize list prices."

I believe that in the circumstances of this case, the instruction was correct, properly presented the issue to the jury,[2] and, hence, did not constitute reversible error.

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2. In Handler, Antitrust: 1969, 55 Cornell L. Rev. 161, 176 (1970), Professor Handler writes: "A compact to exchange price information plainly should be unlawful without more if its *purpose or effect* was to stabilize prices." He observed that in *Container Corporation* defendants had stressed Robinson-Patman as well as fraudulent conduct of the buyers as a defense, but Justice Douglas, author of the majority opinion, "rejected these assertions out of hand."

In Kefauver, The Legality of Dissemination of Market Data by Trade Associations: What does *Container* Hold? 57 Cornell L. Rev. 777, 788 (1972), the author states: "The majority in *Container* of course found an *effect* of price stabilization, but nothing in the opinion indicated that they had found a *purpose* on the part of defendants to achieve such an effect." "*Container* placed a new emphasis on the *effect* of competitors' exchange of market information." *Id.* at 791. Professor Handler noted that a contrary result would promote evasion. *Cf.* Eaton, The Robinson-Patman Act: Reconciling the Meeting Competition Defense with the Sherman Act, 18 Antitrust Bull. 411, 427 (1973). ("There is however a great potential for abuse in any 'lying buyer' defense. Its applicability may therefore be somewhat limited.")

A deliberate scheme to fix prices is, of course, illegal, even if unsuccessful, and in such a case the "purpose" of the defendants would be relevant to establish intent.

B.

The testimony in this case took more than four months and generated a transcript of many thousand pages. After all the evidence had been received, the trial judge's task was to instruct the jury on complex issues of law in the antitrust, conspiracy and general criminal fields. Such a charge must be phrased in language intelligible to a lay audience and, while conveying the substance of the law, must be sufficiently succinct that the jury is not overwhelmed. Too often we on the appellate courts scrutinize jury instructions for adherence to the esoteric standards expected of a law review article. We tend to forget that the charge should be as simple as possible and contain no more than the jury needs to apply law to facts in reaching a verdict.

Judge Hunter's opinion faults the trial judge for failing to give the instruction requested by the defendants which is set out in full at footnote 12. In essence, this point for charge required the jury to determine what kind of agreement or understanding existed as to each defendant. It went on to say that no defendant was to be held responsible for what another conspirator might have done beyond the common agreement or understanding. I assume that the refusal of the trial judge to charge in the precise verbiage requested is not at issue, *see James v. Continental Insurance Co.*, 424 F. 2d 1064 (3d Cir. 1970). Rather, the error claimed is the omission of an instruction to the effect that a particular defendant could be found guilty of conspiracy only if he understood that he had joined the single overall agreement charged in the indictment. As I read it, the charge adequately set forth the spirit of the instruction that Judge Hunter desires. The portions of the charge quoted in footnote 11 of his opinion demonstrate that the jury was told each defendant's mem-

bership in the conspiracy was to be evaluated on an individual basis.

Early in the charge, the trial judge reviewed the indictment which listed allegations of some thirteen manners and means used to implement the price-fixing conspiracy. He later said:

> "Before the jury may find that a defendant or any other person has become a member of a conspiracy, evidence in the case must show, beyond a reasonable doubt, that the conspiracy was knowingly formed and that the defendant or other person who is claimed to have been a member knowingly participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy . . . . [S]o, if a defendant or any other person, understanding the unlawful character of a plan, intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he, therefore, becomes a knowing participant, a conspirator.
>
> * * *
>
> "If it appears beyond a reasonable doubt, from the evidence in the case, that the conspiracy alleged in the indictment was knowingly formed and that any Defendant knowingly became a member of the conspiracy, either at the inception of the plan or scheme or afterward, then the success or failure of the conspiracy to accomplish the common purpose or object is immaterial.
>
> * * *
>
> "In considering whether there was a conspiracy, you should bear in mind that a conspiracy does not have to be completely formed at one place or at one time. It can be put together a little at a time and can be joined

> at different times or in different ways by each alleged conspirator.
>
> * * *
>
> "Now, there are two essential elements which must be proved in order to establish the offense of conspiracy as charged in this indictment:
>
> "First, that the conspiracy described in the indictment was knowingly formed and was existing at or about the time alleged; and,
>
> "Second, that the Defendants *knowingly* became members of the *conspiracy as charged.*
>
> "If the jury should find—you, the jury, should find, beyond a reasonable doubt, from the evidence in the case, that existence of the conspiracy charged in the indictment has been proved, then the conspiracy offense charged is complete, and it is complete as to every person found by the jury to have been *knowingly* a member of the conspiracy, regardless of whether such a person *knowingly became a member at its inception or the beginning of the conspiracy or afterward, during the continuance of the conspiracy.*
>
> * * *
>
> "You have two questions to determine: First, whether there was a conspiracy of the character alleged in the indictment; and, second, if so, which of the Defendants, if any or all, were *knowing* participants in it. This involves an examination of the evidence, separately, with respect to each Defendant.
>
> * * *
>
> "In addition, you would not be warranted in finding any individual Defendant guilty, unless you find beyond a reasonable doubt that, knowing of the exist-

> ence of the conspiracy, he took some action or authorized or directed the employment of one or more means and methods in furtherance of the conspiracy, as I explained to you earlier." (Emphasis supplied)[3]

The jury was not left in doubt that it was to analyze the evidence of each defendant's participation and return a guilty verdict only if convinced of his participation in the price-fixing scheme charged in the indictment. Moreover, just as a challenged sentence or paragraph should be viewed in the context of the complete charge, so should the instructions be considered in the perspective of the trial as a whole. *Cupp v. Naughten*, 414 U. S. 141, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973). After able and vigorous defense counsel had spent many hours arguing their respective clients' innocence and emphasizing the evidentiary matters favorable to them, it is unrealistic to believe that the lack of semantical refinement in a lengthy and otherwise adequate charge had any effect whatsoever on the verdict. In my view, the charge as given was not erroneous but, even assuming it were deficient to some extent, reversal would not be warranted.

C.

Similarly, I do not agree that the charge on withdrawal from the conspiracy constitutes grounds for reversal. Judge Hunter's view is that the instructions improperly excluded the possibility of proving withdrawal by evidence of conduct inconsistent with adherence. Moreover, Judge Hunter asserts that the trial judge told the jurors they could not consider the defendants' theory to

3. These instructions were taken in large part from 1 E. Devitt and C. Blackmar, Federal Jury Practice and Instructions, Chapter 23, Antitrust-Conspiracy-Contract in Restraint of Trade (2d ed. 1970).

that effect. But the charge clearly and accurately stated that withdrawal could be found from evidence showing a defendant "took some affirmative action to disavow or defeat the purpose of the conspiracy." The court also stated that a defendant must have notified other members of the conspiracy or made disclosure to law enforcement officials. The trial judge concluded this phase of the charge by saying:

> "Thus, once a defendant is shown to have joined a conspiracy, in order for you to find he abandoned the conspiracy, the evidence must show that the defendant took some definite, decisive step, indicating a complete disassociation from the unlawful enterprise."

The phrase "some definite, decisive step" was taken from our opinion in *United States v. Chester*, 407 F. 2d 53, 55 (3rd Cir.), *cert. denied*, 394 U. S. 1020, 89 S. Ct. 1642, 23 L. Ed. 2d 45 (1969), and is a correct statement of the law.

If the defendants understood the charge as limiting the evidence of withdrawal to notification, it was counsel's duty to request a correction. After the charge, defense counsel stated to the court:

> "Your Honor in referring to the subject of determination of abandonment of conspiracy named only two precise alternatives and failed to point out that resumption of competitive behavior such as intensified price cutting or price wars could constitute such aggressive action as to terminate conspiracy.
>
> THE COURT: I purposely left that out, as I do not think it is a correct statement of the law."

This colloquy must be understood in light of the discussion which occurred before the charge. Defendants had sub-

mitted a request for charge that "resumption of competitive behavior, such as intensified price cutting or price wars, could constitute such affirmative action. . . ." At a conference held before the summations, the following dialogue took place:

[Defense Counsel]: "Your Honor, may I inquire that you would give the part which says 'Resumption of competitive behavior,' such as intensified price cutting, or . . .

The Court: No, I will not give that. I think that's an improper statement of the law. I am not going to say that.

Competitive behavior may or may not be inconsistent with a conspiracy to fix prices, and it is just as arguable that when prices are low there is a conspiracy to try to get them up and try to get some profits, as there is the other way.

And, furthermore, there is a logical argument here that there are people that were not in the club—as Mr. Fricano put it—not in the conspiracy that caused intensified competition.

So, I am not going to charge that. That's for the jury to determine.

[Defense Counsel]: Do I understand that Your Honor is going to charge that there has to be direct evidence of withdrawal?

The Court: No, I didn't say that at all.

[Defense Counsel]: I mean the point that we are talking about would indicate evidence from which it seems to me the inference would be drawn of withdrawal.

The Court: You can argue that to the jury, but I am not going to tell the jury that merely the fact that somebody was in competition shows withdrawal from a conspiracy. I don't think that's good law.

[Defense Counsel]: I just want to be sure that you are [sic] going to say there had to be direct evidence of withdrawal.

The Court: There are numerous points here that you gentlemen have asked for direct evidence. I am not going to charge that in any instance that there must be direct evidence. There can always be evidence by conduct from which you can imply something."

Thus, defense counsel were advised in advance that the court would make only a general statement of the law and would not adopt their application of the facts, although counsel would be free to argue their factual proposition to the jury. The defense did not object to the charge because it limited evidence of withdrawal to affirmative notification, but rather because the judge refused to weave in the defense interpretation of the evidence. However, the jurors were free to consider that the alleged competitive activity was a definite, decisive step indicating a complete disassociation from the unlawful enterprise. The verdict indicates they rejected that theory. I cannot justify a new trial on the basis of this asserted deficiency in the charge.

D.

The concurring opinion finds reversible error in the trial judge's comments to the jury foreman and in the fail-

ure to declare a mistrial because the jury was deadlocked. I am unable to agree.

In fairness to the trial judge, it must be emphasized that he spoke to the foreman only after receiving the unequivocal assent of the individual defendants and counsel, and indeed at the latter's urging. Defense counsel voiced some misgivings when the judge advised that he would impound the transcript "for review by some other court if that should ever become necessary," but the judge then stated that he would convey to counsel the import of his conversation with the foreman insofar as it did not reflect the thinking of the jurors. Moreover, the judge was explicit in stating that the transcript would not be available to counsel except on appeal, and he would not meet with the foreman if that provision was unacceptable. This condition precedent could not have been misunderstood by counsel.

After the conference with the foreman ended, the judge met with the lawyers and relayed the substance of the jurors' comments. Defense counsel then moved for a mistrial.

> "[O]n the basis that it appears from what we know, from what Your Honor has told us, and our observations, that the jury is deadlocked and it appears unlikely that they would be able to reach a unanimous verdict, apparently even with respect to the individual Defendant parties, and therefore there is the danger of the coerced verdict." [4]

The trial judge did not deny the motion, but deferred ruling, saying: "I am not going to discharge the jury

4. In view of the tenor of the motion, I see no significance in the fact that the trial judge did not report the foreman's belief that the jury was deadlocked. Indeed, the defense lawyers had moved for a mistrial on the previous day because of an allegedly hung jury.

yet . . . . I would like a view as to how much longer I should let them deliberate before I . . . declare a mistrial . . . . " One defense lawyer suggested that the appropriate point would be the following morning but another disagreed, stating that the deliberations had gone far enough. The judge responded that he would allow the jury to continue until Friday, and at that time would rule on the motion. Since the verdicts were returned on Tuesday, the following morning, the motion became moot.

On the preceding Friday, July 11, the fourth day of deliberation, the judge advised counsel that some jurors were not feeling well and others were tired. He listed a number of alternatives which might alleviate the jurors' discomfort, including the option of sending them home for the weekend. When the defense objected, the judge acquiesced, although he recalled that this court had approved the practice of allowing jurors in a criminal case to return to their homes during deliberations. *See United States v. Piancone*, 506 F. 2d 748 (3d Cir. 1974). In an effort to ease the jurors' task, the hours of deliberation were shortened but the sequestration continued.

The concurring opinion contends the jury had the mistaken impression that it was required to reach a verdict of guilty or not guilty. But at no time did the trial judge so charge or otherwise suggest this to the jury. Indeed, he was well aware that such an instruction would be error. After the *Fioravanti* charge was given on Sunday, the sixth day of deliberation, the judge and counsel had the following conversation:

> [DEFENSE COUNSEL]: "That has occurred after Your Honor had on two prior occasions given the charge, first of all in your original charge, then again yesterday afternoon advising them as to their obligation to reach a verdict.

• • •

THE COURT: I would only point out that I did not charge them as to their obligation to reach a verdict.

* * *

I at no time said they had a duty to reach a verdict. I said they had a duty to deliberate toward reaching a verdict. I think that would be error, and I did not do that.

[DEFENSE COUNSEL]: I didn't mean to indicate you used those words. I used that as a short-hand way of referring to the charge Your Honor had given and I believe in all these instances it was similar to the Third Circuit charge . . . . "

In concluding his remarks to the jury foreman on Monday, the judge said:

"You tell them to keep deliberating and *see if they can come to a verdict.*" (Emphasis supplied)

I do not read this as a direction to reach a verdict, but rather that the jury should attempt to reach a verdict. This was a perfectly proper admonition. Plainly the judge did not rule out the possibility that the jury could not come to a verdict since the language of his remark was conditional.

In my view it would not have been proper for the judge to have told the foreman at the private conference that the jury had the option of reaching no verdict. The judge had assured counsel in advance that he would give no instruction on the law during the conference and, indeed, the defense lawyers were most anxious that there be no repetition of the *Fioravanti* charge. It is also highly unlikely that thereafter defense counsel would have asked the court to tell the jury about its privilege to return no verdict. For some time before the conference, all the lawyers were aware that the possibility of a true deadlock existed, but no request for additional charge along that line had been made. Moreover, I would doubt that such an instruction should be given. Experience demonstrates that juries should be encouraged to reach verdicts and should not be proffered an "easy way out" by a judicial suggestion that a deadlock is an equally satisfactory alternative. It is the duty of the trial judge to determine when the jury has "hung," and then declare a mistrial. This procedure adequately protects the right of the parties to a "no verdict" trial.[5]

The reasoning of *Jenkins v. United States*, 380 U. S. 445, 85 S. Ct. 1059, 13 L. Ed. 2d 957 (1965), is not pertinent here. In that case, after only two hours of deliberation, the trial judge stated to the jury in part, "You have got to reach a decision in this case." *Id.* at 446, 85 S. Ct. at 1060. The Solicitor General's brief referred to the principle that jurors may not be coerced into surrendering views conscientiously held. *Fioravanti* also refers to that principle, and the trial judge here cautioned the jury in that vein on several occasions. *United States v. Fioravanti,* 412 F. 2d 407 (3d Cir.), cert. denied, 396 U. S. 837, 90 S. Ct. 97, 24 L. Ed. 2d 88 (1969). The record does not support the assertion that he impermissibly insisted on a verdict.

5. The problem engendered by a charge to the jury advising of its right to return "no verdict" is similar to that in which a criminal jury would be told that it may disregard the charge and acquit the defendant in spite of the law. While a jury does have such a right, the wisdom of such an instruction has been vigorously debated. *See* the opinion of Judge Sobeloff in *United States v. Moylan*, 417 F. 2d 1002 (4th Cir. 1969), *cert. denied*, 397 U. S. 910, 90 S. Ct. 908, 25 L. Ed. 2d 91 (1970). *Cf. United States v. Alper*, 449 F. 2d 1223, 1233 (3d Cir. 1971), *cert. denied*, 405 U. S. 988, 92 S. Ct. 1248, 31 L. Ed. 2d 453 (1972).

The decision to declare a mistrial must in large measure be entrusted to the discretion of the trial judge. He is "on the scene" and is in a position to make an informed judgment on the physical and emotional conditions of the jurors, the difficulties involved in the issues submitted to them, and the likelihood that a verdict will be reached. No record can convey all the imponderable factors to an appellate court, nor does its experience better qualify it in any but the exceptional case to second-guess the trial judge. The fact that the foreman thought no verdict could be reached is not conclusive upon us or the trial judge. It is not uncommon that a verdict is returned after a jury has sincerely thought it was deadlocked. The foreman was not endowed with the experience of the trial judge, and it is understandable that with so many complex issues to be resolved, he became discouraged during the deliberations.[6]

This was a lengthy and vigorously contested case, where the factual issues were close and the mass of exhibits formidable. It would seem inconceivable that any reasoned, responsible verdict could have been reached without extended deliberations. Moreover, the expenditure of time, resources and effort on the part of all concerned obligated the trial judge to exert his best efforts to secure a verdict if one could be reached without injustice or coercion. I am convinced that he properly exercised his discretion. The defendants' contention to the contrary rings somewhat hollow in my ears, particularly in view of their objection to permitting the jurors to return home during the deliberations, at least over the weekend.[7]

6. After the jury returned its verdicts, it was polled several times and each juror unequivocally confirmed the findings of guilt.

7. It is difficult to understand the defense' reluctance about allowing the jurors to return home since they had done so each evening during the months when testimony was being received. If

It has often been said that there are no perfect trials, and the best that our system can provide is a fair one. I believe that criterion was met here and, accordingly, I would affirm.

7. (Cont'd.)
there had been danger of damaging publicity or improper approaches to the jury, it would not have sprung into existence simply because deliberations had begun.

APPENDIX F.

Indictment.

The Grand Jury charges:

I.

DEFINITION.

1. As used herein the term "gypsum board" means the gypsum board machine products manufactured and sold by the defendant corporations, including, but not limited to, wallboard, sheathing and lath.

II.

THE DEFENDANTS.

2. The corporations named below are hereby indicted and made defendants herein. Each of said corporations is organized and exists under the laws of the state, and has its principal place of business in the city, indicated below:

Corporation	*State of Incorporation*	*Principal Place of Business*
United States Gypsum Company	Delaware	Chicago, Illinois
National Gypsum Company	Delaware	Buffalo, New York
Georgia-Pacific Corporation	Georgia	Portland, Oregon
Kaiser-Gypsum Company, Inc.	Washington	Oakland, California
The Celotex Corporation	Delaware	Tampa, Florida
The Flintkote Company	Massachusetts	White Plains, New York

During all or part of the period of time covered by this indictment, and within five years preceding the return hereof, said defendants engaged in the business of manufacturing and selling gypsum board in various states of the United States.

3. The individuals named below are hereby indicted and made defendants herein. During all or part of the period of time covered by this indictment, and within five years preceding the return hereof, each was associated with one of the defendant corporations in the capacity indicated below:

Individual	*Capacity*	*Corporation*
Graham J. Morgan	Chairman of the Board and Chief Executive Officer	United States Gypsum Company
Andrew J. Watt	Executive Vice President	United States Gypsum Company
Colon Brown	Chairman of the Board and Chief Executive Officer	National Gypsum Company
J. P. Nicely	Vice President, Sales	National Gypsum Company
William H. Hunt	President	Georgia-Pacific Corporation
Claude E. Harper	President	Kaiser-Gypsum Company, Inc.
Robert A. Costa	Vice President and General Manager	Kaiser-Gypsum Company, Inc.

Individual	*Capacity*	*Corporation*
William D. Herbert	President	The Celotex Corporation
George J. Pecaro	Chairman of the Board	The Flintkote Company
James D. Moran	President and Chief Executive Officer	The Flintkote Company

III.

Co-Conspirators.

4. The Gypsum Association, a trade association of gypsum board manufacturers, has participated as a co-conspirator with the defendants in the offense charged herein and has performed acts and made statements in furtherance thereof. During all or part of the period of time covered by this indictment, all of the defendant corporations were members of the Gypsum Association and representatives of said defendant corporations attended Gypsum Association meetings.

5. Various other firms and individuals, not made defendants in this indictment, have participated as co-conspirators with the defendants in the offense charged herein and have performed acts and made statements in furtherance thereof. Included among these co-conspirators are Johns-Manville Corporation and Fibreboard Corporation.

IV.

Trade and Commerce.

6. Gypsum board is a common building material which is most often used in the construction of walls and

ceilings. It is manufactured in standard thicknesses, lengths and widths, and while the various kinds of gypsum board are sold under different trade names by different manufacturers, the composition and quality of different brands are essentially the same, and customers switch brands because of slight price differentials or other inducements, such as more favorable terms and conditions of sale, methods of packaging and handling and job price protection.

7. The manufacture of gypsum board involves mixing water, accelerators and fillers with calcined gypsum ore to form a gypsum plaster "slurry" which is sandwiched between surface layers of paper or other materials by machinery which also cuts the board to size. When the gypsum slurry dries, the gypsum in the core reverts to rock form, resulting in a rigid sheet of building material. There are different kinds of gypsum board, such as regular and fire-rated wallboard, lath, sheathing, formboard and backing board. The different kinds of board are produced by the addition of certain ingredients to the gypsum core, by the use of different surface materials or by altering the basic form of the board by means such as lamination or perforation.

8. There is a substantial and continuous movement of gypsum board in interstate commerce from plants where it is manufactured to customers in states other than those where the plants are located. In addition, substantial quantities of the ingredients used in the manufacture of gypsum board regularly move in interstate commerce from their source to states where gypsum board manufacturing plants are located. During all or part of the period of time covered by this indictment, the defendant corporations, along with Fibreboard Corporation and

Johns-Manville Corporation have participated in this interstate movement of gypsum board and its ingredients. Within this period, these firms have sold and shipped substantial quantities of gypsum board to customers in states other than the states in which their plants are located and have obtained substantial quantities of ingredients for use in manufacturing gypsum board from states other than those where their plants were located.

9. During the period of time covered by this indictment, the defendant corporations, along with Fibreboard Corporation and Johns-Manville Corporation had total sales of more than $4 billion and accounted for more than 90 percent of the total sales of gypsum board in the United States.

V.

Offense Charged.

10. Beginning sometime prior to 1960 and continuing thereafter at least until sometime in 1973, the exact dates to the grand jurors being unknown, the defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in the manufacture and sale of gypsum board, in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U. S. C. § 1), commonly known as the Sherman Act.

11. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators to (a) raise, fix, maintain and stabilize the prices of gypsum board; (b) fix, maintain and stabilize the terms and conditions of sale thereof; and (c) adopt and maintain uniform methods of packaging and handling such gypsum board.

12. In formulating and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things, the following:

(a) agreed to increase the prices of gypsum board;

(b) agreed to the terms and conditions of sale of gypsum board;

(c) published price lists and terms and conditions of sale in accordance with agreements reached;

(d) agreed to maintain published prices and terms and conditions of sale of gypsum board;

(e) agreed to maintain job price protection lists and to discuss and exchange data set forth therein in order to insure the maintenance of published prices of gypsum board;

(f) agreed at meetings of the Gypsum Association, over the telephone and by mail to adopt uniform methods of packaging and handling gypsum board;

(g) agreed to adopt uniform methods of delivery of gypsum board;

(h) telephoned or otherwise contacted one another to exchange and discuss current and future published or market prices and published or standard terms and conditions of sale and to ascertain alleged deviations therefrom;

(i) telephone or otherwise contacted one another to ascertain alleged deviations from other uniform practices and policies concerning the sale of gypsum board, including, but not limited to, job price protection, boundaries of price zones, methods of delivery, point of delivery and packaging and handling;

(j) agreed not to undercut gypsum board prices which were ascertained from one another as the actual selling or offering prices to purchasers of gypsum board;

(k) agreed not to give a greater cash discount or more generous terms of sale than those ascertained from one another as the discount or terms being granted or offered to purchasers of gypsum board;

(l) agreed not to deviate from standard, uniform practices and policies in the sale of gypsum board except to the extent deviations from such practices and policies were ascertained from one another; and

(m) engaged in predatory practices designed to eliminate or otherwise contain the competition generated from time to time by certain single-plant producers of gypsum board.

VI.

Effects.

13. The aforesaid combination and conspiracy has had the following effects, among others:

(a) prices of gypsum board sold by the defendant corporations and co-conspirators were raised, fixed, maintained and stabilized at non-competitive levels;

(b) terms and conditions of sale of gypsum board offered by the defendants and co-conspirators were fixed, maintained and stabilized at non-competitive levels;

(c) competition was eliminated in the packaging, handling and delivery methods of gypsum board sold by the defendants and co-conspirators; and

(d) customers of the defendant corporations and co-conspirators have been deprived of free and open competition in the sale of gypsum board.

VII.

Jurisdiction and Venue.

14. The aforesaid combination and conspiracy was carried out in part within the Western District of Pennsylvania and within the jurisdiction of this Court, within five years next preceding the return of this indictment.

Dated:

A True Bill

Foreman

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Thomas E. Kauper
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No. 78-1931

In the Supreme Court of the United States

October Term, 1978

United States Gypsum Company, et al., petitioners

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A10) and of the district court (Pet. App. A15-A18) are not reported. The prior opinions of this Court (Pet. App. A19-A75) and of the court of appeals (Pet. App. A76-A133) are reported respectively at 438 U.S. 422 and 550 F. 2d 115.

JURISDICTION

The judgment of the court of appeals (Pet. App. A11-A12) was entered on May 29, 1979. The petition for a writ of certiorari was filed on June 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence introduced at petitioners' previous trial was sufficient to support a verdict of guilty.

STATEMENT

On December 27, 1973, a federal grand jury sitting in the Western District of Pennsylvania indicted six manufacturers of gypsum board and various of their corporate officials for violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The indictment charged that the defendants, as part of a conspiracy that began prior to 1960 and continued until 1973, agreed to and did: (a) raise, fix, maintain and stabilize the prices of gypsum board; (b) fix, maintain and stabilize the terms and conditions of sale of gypsum board; and (c) adopt and maintain uniform methods of packaging and handling gypsum board.

At trial much of the evidence related to "verification," one of the thirteen types of activities alleged in the indictment to have been employed by petitioners "in formulating and effectuating" their conspiracy. Verification was a practice in which petitioners "telephoned or otherwise contacted one another to exchange and discuss current and future published or market prices and published or standard terms and conditions of sale and to ascertain alleged deviations therefrom" (Pet. App. A22). Petitioners claimed that they engaged in verification solely for the purposes of complying with the Robinson-Patman Act and preventing customer fraud. The United States charged that the purpose and effect of verification were to stabilize prices for gypsum board. The jury, instructed by the district court that it could convict if it found either that defendants intended to fix prices or that their agreement had that effect, convicted all defendants.

On appeal the Third Circuit, although finding that there was evidence to support the government's position both that the defendants had intended to fix prices and that the conduct in question had continued until 1973 (Pet. App. A85-A86), nevertheless reversed and remanded

principally on the ground that a purpose to comply with the Robinson-Patman Act impliedly immunized defendants' conduct under Section 1 of the Sherman Act (*id.* at A84-A99). The court also held that various trial errors had occurred (*id.* at A99-A116).

This Court affirmed the judgment of the Third Circuit remanding the case for further proceedings. Although it rejected the court of appeals' ruling concerning the Robinson-Patman Act (Pet. App. A43-A55), the Court held that the jury instruction concerning intent was erroneous and that the government was required to prove the requisite intent by showing conduct undertaken either (a) with the purpose of stabilizing prices, or (b) with the knowledge that a stabilizing effect on prices was probable and with such an actual anticompetitive effect (*id.* at A40-A42).[1] Four days after it decided *Gypsum*, the Court denied a petition for certiorari by two National Gypsum Company executives who claimed that there was insufficient evidence of their participation within the period of the statute of limitations to implicate them in the price-fixing conspiracy. *Brown* v. *United States*, 438 U.S. 915 (1978).

After the case was remanded to the district court for a new trial in light of *Gypsum*, petitioners moved for judgment of acquittal on the ground that the first trial had produced insufficient evidence of their guilt and that a retrial would therefore violate the double jeopardy clause. The district court denied the motion, finding that the evidence was sufficient (Pet. App. A16).[2] On appeal

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[1]The Court also held that the district court had erroneously instructed the jury concerning withdrawal from the conspiracy (Pet. App. A59-A62) and had wrongly engaged in *ex parte* communication with the jury foreman (*id.* at A59).

[2]The district court also expressed reservations whether *Burks* v. *United States*, 437 U.S. 1 (1978), would bar a retrial where the evidence at the first trial is held to be insufficient because of a supervening development concerning the substantive law (Pet. App. A17).

from denial of the motion, the court of appeals, in an opinion by the same panel that had heard the original appeal, unanimously affirmed on the basis that there had been ample proof at the first trial of the formation of petitioners' price-fixing conspiracy, of the continuation of the conspiracy into the statutory period, and of all other elements of the offense charged (*id.* at A6-A10).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any court of appeals, and does not warrant further review.

Petitioners under three distinct headings actually present but a single issue: the sufficiency of the evidence at the first trial. As their lead counsel explained in opening his argument in the court of appeals, "The issue simply is the sufficiency of the evidence to support the defendants' convictions of conspiracy to raise, fix, maintain or stabilize prices during the period from December 27, 1968 to December 27, 1973."[3] This is a routine contention of factual error, and "review would be of no importance save to the litigants themselves." *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962). Review would be particularly unjustified here, for the district court and the court of appeals have both rejected petitioners' claims of insufficient evidence, and this Court itself has declined a prior invitation to examine the matter. Moreover, the lower courts were correct in sustaining the sufficiency of the evidence. That evidence, which is set forth at length in the government's brief on the merits in *Gypsum*, is summarized below.

1. Notwithstanding petitioners' contentions (Pet. 8-14), the courts below properly held that there was sufficient

[3]Transcript of Oral Argument, March 15, 1979, at 4.

evidence that petitioners engaged in verification for the purpose of stabilizing prices after December 27, 1968, the beginning of the applicable statute-of-limitations period.[4]

The trial record contains ample evidence directly demonstrating petitioners' illegal conduct during the statutory period. For example, A. L. Meyer of Georgia Pacific ("G-P"), who spent 27 years as a pricing official in the gypsum industry, actively engaged in the practice from as early as 1960 until his retirement in June 1969 (II A. 533-534).[5] Meyer acknowledged that the purpose of the price exchanges in which he engaged with each of the other corporate defendants was "to keep market stability" (II A. 545).[6] Burch, who succeeded Meyer at G-P, was indoctrinated in this practice by Meyer before Meyer's retirement (II A. 532-534; I A. 510). Burch acknowledged continuing to engage in verification until 1972 (I A. 504-505) because "[y]ou did not want to destroy your own market" (I A. 514).

[4]To the extent petitioners claim that the double jeopardy clause bars their retrial because of the insufficiency of the evidence at the first proceeding, see *Burks* v. *United States*, 437 U.S. 1 (1978), their position is, as demonstrated below, unavailing. To the extent petitioners claim that the court of appeals' decision is at variance with this Court's ruling in *Gypsum*, their argument is premature and not properly before the Court on review of the denial of the motion to dismiss on grounds of double jeopardy. Petitioners will have an adequate opportunity to raise the latter contention if and when they are convicted upon retrial. In any event, the decision of the court of appeals is fully consistent with *Gypsum*.

[5]As used in this Brief, the Appendix in the Supreme Court in the first *Gypsum* case is designated by "A." and is preceded by the volume number (in Roman numerals) and followed by the page number; the Brief for the United States on the merits in the first *Gypsum* case is designated as "United States Brief;" and the Appendix in the court of appeals in the first *Gypsum* appeal is designated by "ex" for exhibits and "C.A. App." for testimony.

[6]Sikes, an associate of Meyers at G-P from 1960 until 1967, confirmed that verification was to "save money" (II A. 587-588), and that, but for the practice, competition would "break a marketplace," the profits for the company would have been less, and the prices would have deteriorated (II A. 588-589).

Atwell of National Gypsum ("National") engaged in the practice from 1960 until at least January 1969. Although Atwell claimed that the discussions were for compliance with the Robinson-Patman Act (II A. 628-634), he admitted participating in verification in order to avoid "a deteriorated price situation in a region," and acknowledged that "price checking helped to prevent that type of thing" (II A. 659-660).

Jarrett, the general credit manager of Celotex, testified that his verification discussions occurred from 1965 to 1971, that these discussions dealt with competitive credit terms, and that his objective in the discussions was to avoid the added cost or the diminution of profits resulting from more liberal credit terms (II A. 825-826, 834-835).

United States Gypsum ("USG"), by formal authorization that lasted from 1962 until at least February 13, 1969,[7] allowed its pricing and credit officials to exchange competitive information with competitors expressly to avoid "consequences unfavorable to the company" (V A. 2651-2655), *i.e.*, the loss of profits resulting from market instability (I A. 339-340, 375-376, 377, 159-160). Seeking

[7]USG's verification in fact appears to have continued after February 13, 1969. The only document indicating any cessation by USG is a February 13, 1969 letter by USG's vice president, Watt, directing his subordinates to stop asking competitors about their prices and terms of sale "until the situation [created by this Court's decision in *United States* v. *Container Corporation*, 393 U.S. 333 (1969)] is clarified" (IV A. 2280). However, Thompson of Celotex testified that USG did not stop verifying with Celotex until December 1970 or December 1971 (III A. 1274), while Simpson of Republic quoted Watt as saying that USG would no longer exchange prices with Republic in "the 69-70 period" (I A. 270-271). In addition, during the statutory period USG also continued to use previously agreed-upon list prices, credit terms, and packaging and handling restrictions.

to avoid any "inference" of illegal activity, however, USG cautioned its officials not to keep any written records of competitor contacts (V A. 2651-2655).

This direct proof of petitioners' unlawful activity within the statutory period is also corroborated by the clear evidence of similar unlawful acts by petitioners in the pre-statutory period. For instance, Bear, a USG vice president in the early 1960s, testified that verification was employed for the "obvious purpose" of avoiding price deterioration by preventing competitors from undercutting each other (I A. 159-160). Gimlin, a USG vice president who succeeded Bear, admitted engaging in verification "so we wouldn't be over competitive on price" and recognized that verification had the effect of stabilizing prices (I A. 340, 375-378). Another USG pricing executive, Galvin, gave similar testimony (II A. 959-960).

In addition to this and other testimony, documentary evidence further established the anticompetitive purpose of the conspiracy in the pre-statutory period.[8] The verification discussions covered the entire scope of competitive activities in the market and helped to facilitate specific price agreements. One area in which petitioners used verification for anticompetitive purposes

[8]None of the petitioners kept systematic records of their verification activities, notwithstanding their contention that such contacts were made in order to comply with the Robinson-Patman Act (III A. 1459-1460, 1420; I A. 395, 428-429; II A. 628-634; III A. 1272, 1251-1252). As the Fourth Circuit recently observed, careful record keeping "would be the natural object of anyone genuinely concerned over Robinson-Patman violations." *Phillips* v. *Crown Central Petroleum Corp.*, No. 77-1780 (4th Cir. July 2, 1979), slip op. 14. Petitioners also took care to avoid keeping records of what they recognized were incriminating price discussions (IV A. 2362-2363; II A. 603-606, 542; I A. 409-414). And at least one petitioner, Celotex, when threatened with suit, destroyed as many of these documents as it could, despite a general document retention policy calling for their preservation (1698 ex, 1690 ex, 1691 ex).

was price protection, or a guarantee to a customer of a specified price for a prescribed duration (United States Brief at 21-23, 36-37). In addition, the applicator allowance, a form of discount characterized by one of the conspirators as "vicious competition" (375 ex), was eliminated in an entire market area through petitioners' use of verification (V A. 2402-2405).[9] On another occasion, Atwell of National complained to McCaskill of G-P that G-P's Savannah Branch was "selling board out of warehouse at (only) $1.24/MSF above dealer cost" and threatened to retaliate by opening warehouses and shipping by truck if G-P's prices were not increased (IV A. 2309, 2327; I A. 410-414). McCaskill quickly responded by increasing G-P's Savannah area prices and instructed a subordinate to convey the new prices to Atwell prior to internal publication (IV A. 2308; 763 ex).[10]

In addition to these areas of verification, the documentary evidence also showed that in the pre-statutory period petitioners policed deviations from uniform list prices and methods of delivery (111 ex, 112 ex; II A. 542-545; United States Brief 37-40), from price increases (V A. 2458; 361 ex-364 ex; IV A. 2400-2401; 324 ex), and from credit term

[9]McCaskill, one of the G-P executives who participated in these conversations, described them as a "very vivid example" of verification as practiced by petitioners (I A. 404-406).

[10]Moreover, within weeks McCaskill had secured approval of a new company-wide policy providing for a minimum 5% markup by all G-P branches (V A. 2555-2559; 1369 ex-1397 ex). McCaskill instituted this policy so that it would be "available for everyone involved" and would give "competition * * * a chance to objectively evaluate and calculate their next move while at the same time, resist the temptation to cut prices or install variable discounts to dealers" (V A. 2555-2559).

agreements (United States Brief at 40-42).[11] Contacts were made to gain assurances that sales would be made on the basis of list price only (V A. 2453; II A. 575-577; IV A. 2311; II A. 550-551). The assurances were achieved through policing calls involving as many as four companies (130 ex) and covering entire sales areas, and notes of such conversations were written in code by G-P executives (II A. 537-539, 575-578). When it appeared that USG was adopting new policies concerning delivery, McCaskill at G-P became disturbed and instructed his subordinate to contact USG to learn the facts and then to relay the information to National officials Atwell and John Brown (IV A. 2295; II A. 543-545). Similarly, when Kaiser was reported to have begun trucking in the Southeast, McCaskill issued directions "to discuss this [trucking] with the Boys in the market place & determine if we [G-P] should truck and where" (IV A. 2359); as a result of these instructions McCaskill's subordinate contacted Evans of USG (2750 ex), Atwell of National (IV A. 2363; II A. 542-543), and Miller of Celotex (2706 ex).

Petitioners (except for USG) concede that they engaged in verification during the statutory period (Pet. 6, 12, 13), and they do not challenge the sufficiency of the evidence of anticompetitive purpose for verification prior to

[11]The anticompetitive nature of these policing contacts is made clear by the fact that petitioners continued such discussions from December 1965 through 1967 even though during that period each was following their agreed-upon policy of selling only at list prices and not meeting single-plant competition. Since petitioners were not discounting while that policy was in effect, it was completely unnecessary for them to exchange information for the purpose of avoiding price discrimination charges.

December 27, 1968.[12] They argue, however, that as of that date the situation drastically changed and that thereafter their conduct must be viewed as benign because they then engaged in "vigorous price competition" and verified only to comply with the Robinson-Patman Act (Pet. 12-14). This argument is groundless. It is not only inconsistent with petitioners' representation to the court of appeals that the character of price verification was the same "in both the pre-statutory and the statutory periods alike,"[13] but it is also belied by the record. The evidence clearly demonstrated the existence of an anticompetitive purpose during the statutory period (see pages 5-7, *supra*). Moreover, none of the witnesses differentiated between the pre-statutory and statutory periods.[14] And petitioners' claim of a "price war" during the statutory period (Pet.

[12]USG alone argues that it did not engage in verification during the statutory period (Pet. 9-10). Since the company had a formal policy of verification in effect until at least February 1969 (IV A. 2280), and since the testimony of Thompson of Celotex and Simpson of Republic established USG verification well into the statutory period (see note 7, *supra*), the court of appeals correctly held that there was was sufficient evidence to support a verdict of guilty as to USG. Moreover, since there was sufficient evidence that USG continued to participate in the conspiracy during the statutory period, its contention (Pet. 14-16) that the government failed to prove that it did not withdraw from the conspiracy prior to the statutory period must be rejected as factually unfounded.

[13]Joint Brief for Appellants at 41, *United States* v. *United States Gypsum Co.*, Nos. 75-1836 *et seq.* (3d Cir.).

[14]Petitioners argue that their verification in the statutory period was pursuant to the advice of counsel to comply with the Robinson-Patman Act (Pet. 11, 13). This, however, is a twice-told tale: they advanced the same explanation for the pre-statutory period conduct. See also notes 8, 11, *supra*.

12-13) is unsupported by the trial record[15] and, in any event, cannot serve to legitimate verification in the statutory period because discounting and verification had begun prior to December 27, 1968 (Pet. 12-13), when there is ample evidence of anticompetitive purpose. In short, December 27, 1968 is simply irrelevant to the issue of verification. The evidence is all of a piece, and there is no basis to distinguish petitioners' purpose in verifying prior to the statutory period (when there is sufficient evidence of anticompetitive purpose, notwithstanding the claimed "price war") from that during the statutory period.

[15]Petitioners did not fight a general "price war" against each other. They did, however, engage in selective predatory price cutting directed at the single-plant producers while using verification to keep their own prices stabilized elsewhere. In December 1965, petitioners implemented new prices, and for more than two years thereafter they adhered to an agreed policy of not discounting and not meeting the competition of single-plant producers. During this time they continued to use verification as a means of policing their agreement. In 1968 the single-plant producers' market share had grown sufficiently to compel some responsive action. Petitioners' limited response was to discount only "on a selective basis" (1316 ex) in the prime market areas of the single-plant producers, particularly in the Southwest. Petitioners continued their own price exchanges and through them were able to maintain higher price levels in areas less susceptible to competition from single-plant producers. Thus petitioners' own data show, for example, that prices in the Washington, D.C. and Minneapolis markets were $11 to $13.50 higher than in the Dallas market from September 1968 to June 1970 (2238 ex, 2239 ex, 2235 ex, 2236 ex). In some areas, such as Pennsylvania, petitioners succeeded in raising prices during 1969 (C.A. App. 3683a). Petitioners' actual prices in 1969 directly paralleled those in 1965 when by their own analyses prices were "fairly stable" except where the single-plant producers "make the rate" (420 ex; V A. 2408), and it was not until 1970 that price levels in the aggregate dropped below those of 1965 (V A. 2743). As petitioners' own officials testified, verification did in fact stabilize prices (*e.g.*, I A. 340; II A. 660). Thus there was no "price war," and there is, as the government has consistently maintained, sufficient evidence of anticompetitive effects. Notwithstanding petitioners' assertion (Pet. 8), the court of appeals did not hold to the contrary (Pet. App. A10 n.4).

2. Petitioners also argue that the government charged a conspiracy with three objectives, presented sufficient proof at most of only one, and thus is barred by the double jeopardy clause from retrying petitioners (Pet. 17-23). This argument is without merit.[16] As the court of appeals found, the three allegedly distinct objectives of the conspiracy are not separate (Pet. App. A9). The court rightly observed that the objectives of stabilizing terms of sale and maintaining uniform methods of packaging and handling "are integral parts of the first" objective—to lessen price competition (*ibid.*).[17] Petitioners recognized this unitary nature when they accepted without objection the district court's instructions that the terms and conditions of sale are components of price and that fixing the methods of handling would not be illegal in this case except as part of a price stabilization agreement (*ibid.*).

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[16]Contrary to petitioners' suggestion (Pet. 18), the court of appeals did not rule that the government had failed to prove all three objectives of the conspiracy (Pet. App. A9). However, the court did expressly reject petitioners' argument that the government must prove all thirteen means alleged to carry out the conspiracy (*id.* at A8-A9). Petitioners do not seek review of that ruling in this Court.

[17]The evidence is clear that petitioners tightened credit terms in early 1966 as an integral part of their new pricing program begun in December 1965. See United States Brief at 31-35. Similarly, the agreed credit terms which continued during the period covered by the indictment were subject to policing through verification (*id.* at 40-42). Petitioners also consistently recognized that special packaging practices were the equivalent of price discounts and would, if granted, have to be met with a cash discount (1544 ex, 482 ex, 1581 ex; 1 A. 441).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1979

DOJ-1979-08

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UNITED STATES OF AMERICA.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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UNITED STATES OF AMERICA

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, United States Gypsum Company ("USG"), National Gypsum Company ("National"), Georgia-Pacific Corporation ("G-P") and The Celotex Corporation ("Celotex"), file this reply brief, pursuant to Rule 24(4), in support of their petition for certiorari. The purpose of this brief is to redirect the Court's attention to the actual issues raised by the petition, which the government has either misstated or ignored, and to correct several of the government's serious misrepresentations of the record.

1. Contrary to the Government's Contention, This Petition Raises Substantial Issues of Law, Not Just the Sufficiency of the Evidence in This Case.

The government's brief in opposition relies entirely on the erroneous contention that the sole issue raised by the petition is a "'routine contention of factual error.'" (U. S. Br. p. 4) [1] Although the ultimate question before the court of appeals was the sufficiency of the evidence at the first trial, in deciding that question, the court below applied the wrong *legal* standards. It is the correctness of those legal standards which is the focus of this petition.[2] These are issues of law, not fact, and, as the Petition demonstrates, their importance transcends this particular case.

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1. The Brief for the United States In Opposition to this petition is cited by the notation "U. S. Br." The petition itself is designated as the "Petition." The Appendix in this Court in its initial consideration of this case 438 U. S. 422 ("Gypsum") is designated by "A" and is preceded by the volume number (in Roman numerals) and followed by the page number.

2. The government surprisingly suggests that somehow petitioners' challenge to the court of appeals' erroneous application of *Gypsum* in this double jeopardy appeal is premature and can only be made after petitioners have been retried and their double jeopardy rights irretrievably lost. (U. S. Br. p. 5 fn. 4) Certainly this Court's decision in *Burks v. United States,* 437 U. S. 1 (1978) contemplates, as part of the constitutional protection against retrial where the evidence at the first trial was insufficient, that the sufficiency of the evidence be judged by the proper legal standard; otherwise, the guarantee is meaningless. Moreover, the notion that a double jeopardy claim cannot be fully resolved until after the second trial was repudiated in *Abney v. United States,* 431 U. S. 651 (1977). Finally, the government has conceded that the sufficiency of the evidence must be tested under the standards set forth in *Gypsum.* (Petition, p. A4, fn. 1)

2. The Government's Assertion That the Court of Appeals Followed This Court's Decision in Gypsum Misrepresents Petitioners' Contentions, Misrepresents the Trial Record and Dramatizes the Need to Grant Certiorari in This Case.

The government expressly adopts the court of appeals' assumption that the statute of limitations period "is simply irrelevant to the issue of verification." (U. S. Br. p. 11) It tries to support that proposition with an argument that misstates the trial record and the petitioners' contentions.

The court of appeals was unable to point to any evidence of criminal intent within the statute of limitations period. Rather, to supply the missing intent element, it relied on the testimony of officials who had either left their company's employ or were no longer engaged in verification by the opening of the statutory period. As the Petition has already pointed out, this approach conflicted with this Court's prior decision in this case on the requirement of criminal intent and on the nature of verification. (Petition, pp. 8-14)

In an effort to bridge the gap in the court of appeals' opinion, the government tries to show that persons having the requisite criminal intent in fact verified in the statutory period. But the government's handiwork ruthlessly misstates the record. Its assertion that USG "appears" to have verified in the statutory period (U. S. Br. p. 6 fn. 7), misrepresents the testimony of both of the witnesses cited. Simpson and Thompson were, at most,[3] testifying about the date on which they had been informed USG had *already* stopped verifying. Neither witness testified to when USG stopped or that USG verified in the statutory period,

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3. In fact, the only reasonable construction of Simpson's testimony is that it did not refer to the timing of any discussion about when USG stopped verifying, but about the timing of an entirely different discussion. (See Petition, p. 10 fn. 4.)

and all of the other evidence in the record shows that USG instructed its personnel, months before the beginning of the statutory period, not to verify on gypsum products and that this instruction was obeyed. (Petition, p. 10 fn. 4) Moreover, the government's statement that "USG cautioned its officials not to keep any written records of competitor contacts" in order "to avoid any 'inference' of illegal activity" (U. S. Br. pp. 6-7), is totally without foundation, as the document cited says absolutely nothing about written records. The caution given in that document was to avoid the contacts themselves, not to avoid any record of them. (V A. 2651-55)

The only National witness cited in the government's brief was Atwell, who the government claimed, verified "until at least January 1969." (U. S. Br. p. 6) The assertion is unsupported by the record. There is no evidence that Atwell verified after the beginning of the statutory period on December 27, 1968. (See Petition, p. 11 fn. 5.)

The government also takes undue liberty with the record in claiming that G-P's Meyer verified "until his retirement in June 1969." (U. S. Br. p. 5) While Meyer did testify affirmatively to a question asking whether he verified "from time to time from the period 1960 to the time of his retirement" (II A.533-34), this in no way establishes that any of those contacts occurred after the critical limitations date of December 27, 1968, particularly where Meyer also testified that he did not recall any verification at all in 1969. (II A.562-64)

Finally, the government cites the testimony of Celotex's Jarrett. While Jarrett admittedly verified in the statutory period, the government points to no evidence that his purpose in doing so was to stabilize prices. In the testimony cited by the government, Jarrett acknowledged that one of the benefits of verifying was that Celotex would not sacrifice any more money than it had to in order to

get a sale, but also testified that his purpose in verifying was to comply with the Robinson-Patman Act. (II A. 833-34, 835-36) Jarrett said nothing about the hypothetical impact of verification on market prices generally, and his testimony obviously does not evidence the kind of distinct purpose to produce anticompetitive effects required under this Court's more elevated standard of criminal intent. (Petition, p. A40 fn. 21; 438 U. S. at 444-45 fn. 21)

The government's claim that the price war "cannot serve to legitimate verification in the statutory period because discounting and verification had begun prior to December 27, 1968" (U. S. Br. p. 11) is a non sequitur, misstates petitioners' contentions, and attempts to shift the burden of persuasion to petitioners to prove their innocence. It is not the petitioners' burden to "legitimate" verification; it is the government's burden to prove, beyond a reasonable doubt, that the isolated verification which did occur in the statutory period was done with the distinct purpose of fixing prices. The price war is a critical circumstance which, consistent with this Court's prior opinion in this case, must be considered in making that determination. (Petition, p. A36 & fn. 16, pp. A61-62 & fn. 38; 438 U. S. at 441 & fn. 16, 438 U. S. at 463-465 & fn. 38) The fact that the price war actually began prior to December 27, 1968 only underscores the absence of criminal intent during the statutory period.

The government's reliance on misstatements of the record and specious contentions in an effort to explain the court of appeals' decision merely highlights why the analytical basis for that decision is unsound.[4] If this kind

4. The government further misrepresents the record in its attempt to gloss over the price war waged prior to and throughout the statutory period. In support of the assertion that defendants' price cutting activity in 1968 was selectively aimed at the single-plant producers in the Southwest, the government cites a document

of slapdash argument is sufficient in the lower courts to sustain criminal convictions, then there is something radically wrong with the way this Court's decision in *Gypsum* is being applied, and certiorari should be granted in this case to rectify the problem.

3. The Government Would Shift the Burden of Proving Withdrawal to Petitioners.

The government does not respond at all to the legal question of whether the court of appeals can properly shift the burden of persuasion on withdrawal in a criminal conspiracy case to the defendant. Yet the government's own evidentiary contentions rely on just such a shifting of the burden. The notion that USG can be held criminally liable for merely failing to rescind in writing a pre-statutory authorization to verify, when there was no credible evidence of USG verification in the statutory period, but there was uncontradicted testimony by several witnesses that oral instructions to stop verifying had been given prior to the statutory period (U. S. Br. pp. 6, 10 fn. 12); the notion that it is the duty of a criminal defendant to adduce evidence that "differentiate[s] between the pre-statutory

4. (Cont'd.)
which does not purport to be an exhaustive listing of competitive activity, but describes competitive activity in the Southeast and in San Francisco, markets that are not served by single-plant producers. (Ct. of Appeals App., 1316 ex) (U. S. Br. p. 11 fn. 15) In support of its bald and patently untrue assertion that petitioners' prices in 1969 "paralleled those in 1965" (id.) the government cites nothing at all. Nor can the Government cite any evidence whatever supporting its fancied assertion that "during the statutory period USG also continued to use previously agreed-upon list prices, credit terms, and packaging and handling restrictions." (U. S. Br. p. 6, fn. 7) In an effort to show that the record contained evidence of anticompetitive effects, the government cites only evidence of price levels which were higher in some areas and at some times than in others, oblivious to the distinction between merely higher prices, which have no antitrust significance, and uniform or stable prices.

and statutory periods" (U. S. Br. p. 10); and the notion that it is a criminal defendant's duty "to legitimate verification in the statutory period" (U. S. Br. p. 11) all reflect a clear shifting of the burden of persuasion on withdrawal. The legality of that shifting presents an important constitutional issue, which cannot be avoided in this case. (See Petition, pp. 14-17.)

4. The Government Endorses the Court of Appeals' Amendment of the Indictment.

The government's effort to justify the court of appeals' failure to require proof beyond a reasonable doubt as to each of the three objectives of the conspiracy charged in the indictment relies solely upon the contention that the court was entitled to redraft the indictment to eliminate the second and third objectives and subsume them into the first. (U. S. Br. p. 12) This contention has been fully refuted, and the importance of the issue demonstrated, in the initial Petition. (See Petition, pp. 17-24.) Moreover, the court of appeals' decision is predicated on the assumption that "terms and conditions of sale are really components of price." (Petition, p. A9) This places the decision below squarely in conflict with a case decided by the Ninth Circuit subsequent to the filing of the Petition in this Court. In *Catalano, Inc. v. Target Sales, Inc.*, 1979-2 T. C. ¶ 62,805 (9th Cir. 1979) the Ninth Circuit expressly recognized that credit-fixing is not synonymous with price-fixing. This is an antitrust issue of broad significance beyond its importance in this case, as to which the conflict in the circuits should be resolved.

5. Conclusion.

The government's brief demonstrates the error and injustice which results, and will continue to result if not corrected, from the erroneous legal standards applied by the court of appeals in this case. In order to assure proper enforcement of this Court's prior decision in this case, the petition for writ of certiorari should be granted.

Respectfully submitted,

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